REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.

By JOSEPH S. BOSWORTH,

CHIEF-JUSTICE OF THE COURT.

VOLUME IV.

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JUSTICES

OF THE

NEW YORK SUPERIOR COURT,

DURING THE TIME OF THESE REPORTS.

JOSEPH S. BOSWORTH, CHIEF JUSTICE.

MURRAY HOFFMAN, JOHN SLOSSON,[1] LEWIS B. WOODRUFF, EDWARDS PIERREPONT, JAMES MONCRIEF,[2] ANTHONY L. ROBERTSON,[3]	JUSTICES.

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[1] His term of office expired on the 31st of December, 1859.

[2] Re-elected in November, 1859, for the full term of six years, commencing January 1st, 1860.

[3] Elected in November, 1859, for the full term of six years, commencing January 1st, 1860.

CASES

REPORTED IN THIS VOLUME.

NOTE.—Mr. Justice WOODRUFF, has rendered the same aid in the preparation of this, as in that of the third volume of these reports.

CASES ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK

AT GENERAL TERM.

EDMUND SAVAGE, Plaintiff, *v.* THE CORN EXCHANGE FIRE AND INLAND NAVIGATION INSURANCE COMPANY, Defendants.

1. An insurance company, receiving preliminary proofs of loss and of interest which may reasonably be deemed sufficient, and retaining them three or four days, and then refusing to pay the loss without any intimation that the proofs are defective or unsatisfactory, should not be permitted to make that objection after the time allowed for payment by the policy has expired, and an action has been brought.
2. It is not necessary that the preliminary proofs to be furnished by the assured, should be in a form or under an authentication which would entitle them to be read as evidence of the facts certified.
3. Where the plaintiff, being a common carrier, effected an insurance on cargoes, on account of himself or others, on his boats or others running on commission or by charter, in a transportation line specified, which was conducted by him, a pass book in which a cargo is entered by the defendant's agent as duly shipped, the bills of lading, and a regular protest by the master of the vessel averring the fact of loss and the cause thereof, and that the cargo was taken possession of by the defendants, are sufficient proof of loss and of interest to require the underwriters to specify defects, if any, and call for further evidence, if they desire it.
4. A common carrier may, for his own protection, insure goods intrusted to him for carriage.
5. Where the insurance is upon his own interest alone, it may be material to inquire whether the cause of loss be such that he is responsible to the owners for the value of the goods; but where the insurance is of the goods

themselves, on account of himself or others, and the perils insured against are, many of them, such as if a loss happen thereby, he is not responsible therefor to the owners, the insurance will be deemed for the benefit of the owners as well as himself, and the Company are liable for the value of the goods, although the cause of loss be such as to involve him in no liability.

6. Where the office of the defendants was in New York, but the insurance was made in Buffalo, where the plaintiff resided, by the defendants' agent in Buffalo, and the loss happened on the night of Saturday, on the Hudson river, between New York and Albany, and the plaintiff being notified by telegraph, gave notice to the agent at Buffalo on Monday, and by him the defendants in New York were notified on Tuesday, this is sufficient to satisfy a requirement in the policy that "immediate notice of the occurrence of all losses shall be given to the Company."

7. Where injury to the cargo is caused by a peril insured against, the omission of the plaintiff's servants to take precautions to prevent further damage than is necessary, may be given in evidence to reduce the amount of the recovery, but does not operate as a forfeiture to prevent a recovery for the necessary damage, unless so expressed in the policy.

8. An assignment of the plaintiff's claim, before suit brought, cannot be given in evidence to show that the action is not prosecuted by the real party in interest, unless that defence is set up in the answer.

9. It seems that a common carrier insuring goods for account of himself and the owners, has no authority, in case of injury to the goods, to abandon them to the underwriters.

10. Giving notice of loss, neglecting to take care of the property, suffering the agents of the underwriters, to take measures for its preservation, and their selling the property by the assent of the insured or his agent, pursuant to a stipulation in the policy, which provides that in case of loss the damaged portion shall be separated from the sound, and the amount of damage ascertained by appraisal or sale at auction, the underwriters "being liable for the loss on the damaged portion only," do not amount to an abandonment and an acceptance thereof, making the underwriters liable for the sum insured as for a total loss.

11. Underwriters are not bound, when the assured neglects to take care of property partially injured, to suffer it to be further neglected and go to decay, at the peril of being charged with the same consequences which result from the acceptance of an abandonment. They may take care of and preserve the property if the insured do not.

12. Hence evidence of the actual extent of the injury by the peril insured against; evidence of negligence by the agents of the assured, in the care of the property after the accident; their refusal to suffer it to be removed, or to accept assistance to remove it for its preservation; evidence of what it actually produced on the sale—are all admissable.

13. Under a policy which expressly *excepts* from the perils insured against, "perils, losses and misfortunes arising from a want of ordinary care and skill in lading or navigating said boat or boats," if it appear that the master of the

boat voluntarily and against the will and advice of the captain of a vessel employed to tow her, placed her in a dangerous position for being towed, and the injury happened while she was being towed in that position, it is error to charge the jury that "her position in the tow is of no importance."

14. The maxim "*causa proxima non remota spectatur*," is the general rule by which the liability of insurers is determined, but parties may, by express stipulation, agree upon another.

15. Where the policy declares that the insurers shall be liable for the loss on the damaged portion of the goods only, to be estimated according to the true and actual value of the property insured at the time the loss happens, the carrier is not entitled to recover, in addition to such value, his freight and charges. Presumptively, the enhanced value at the place of loss, covers the freight, &c., to the place of loss; freight for the distance not carried, is not covered by such a policy.

(Before SLOSSON, WOODRUFF and PIERREPONT.)

Heard, Oct. 7th; decided, Dec. 11th, 1858.

THIS case was brought to a hearing at the General Term, on motion by the plaintiff for judgment on the verdict had by him on the trial of the action before Chief Justice OAKLEY and a jury January 26th, 1857.

The action is brought upon an open policy of insurance, whereby the defendants insured the plaintiff "against any loss or damage he may sustain on cargoes, *on account of himself or others*, on his own boats or boats belonging to others, and running in the 'New York and Indiana Line,' by charter or on commission, loaded at Buffalo or at other ports or places, *as may be entered hereon*, for the several sums or amounts, and at the rates of premium agreed upon, and entered hereon by John N. Gardner, agent."

The perils, risks, &c., insured against, (among others,) were of the canals, rivers and fires, and all other perils and misfortunes, to the hurt, &c., or damage of the goods, &c., laden on board of said boat or boats, in the voyage or *trip* aforesaid, excepting, (among other things,) "perils, losses and misfortunes arising from" * * * * "a *want of ordinary care and skill*, (such as is common in said navigation,) in lading or navigating said boat or boats;"

And the defendants agree to make good and satisfy *unto the said assured* all such loss or damage *on the said goods, &c.*, so laden as aforesaid, not exceeding in amount the sum insured thereon,

as shall happen from any of the aforesaid causes, *excepting* as aforesaid.

The policy provides that immediate notice of all losses that occurred shall be given to the Company by the assured, and the amount of loss shall be ascertained by the opening of packages, when necessary, by a competent person, and *separating the sound from the damaged portion*, the *Company being* liable for the loss on the *damaged portion only*, which shall be ascertained by appraisement, or *by sale at auction*, as the Company may prefer; the loss or damage to be estimated at the true and actual value at the time the loss or damage shall happen; and to be paid within sixty days after notice and *proof of the loss and interest* therein shall have been made by the assured.

Among other provisions not material to the present case, it is stipulated that no loss is to be paid arising from neglect in not *keeping the boat* well pumped out, except in case of accident; and also, that in case of a loss or damage by any other vessel, or person or persons, in such manner that such other vessel, or the owners thereof, or such person or persons, shall be liable therefor; then all claims for such loss or damage shall be assigned to the Company, or shall enure to their benefit.

The policy was signed by the President, and attested by the Secretary of the Company, but it was declared not valid unless countersigned by John N. Gardner, agent at Buffalo, and it was countersigned by him.

Attached to the policy was what the agent, Gardner, when examined as a witness, calls "an open policy book," in which were entered each particular risk taken under such policy; and on the 25th September, 1854, the agent, Gardner, entered two risks, which form the subject of the present controversy, and signed such entry as agent for the defendants.

Cargo of corn, boat J. N. Fiske, from Buffalo to New York, to be reshipped on either lake boat North Star or Hudson, from Albany. Amount insured $3,000; premium ½, $15.

Cargo of corn, boat J. B. Chapman, as above. Amount insured $2,400; premium ½, $12.

And these entries conformed to the actual agreement, and the premium was paid.

The boats J. N. Fisk, J. B. Chapman, and the Hudson, belonged to the plaintiff, and were running, the first named two from Buffalo to Albany, and the Hudson from Albany to New York, in the "New York and Indiana Line," the name by which the plaintiff did business as a carrier from Buffalo to New York.

J. M. Deshler, the consignee of the property at Buffalo, (a produce forwarding and commission merchant,) delivered the corn at Buffalo, to the plaintiff; 4,000 bushels on board the J. N. Fiske, and 3,100 bushels on board the J. B. Chapman; and the memorandum of shipment stated that they were for "account of S. Robinson & Co., care N. H. Wolfe & Co., New York."

On the receipt of the grain for transportation, the plaintiff paid to Deshler $621.25, for charges already accrued upon the corn, for freight to Buffalo and expenses at Buffalo, in course of transportation to New York. The freight, which was to be paid to the plaintiff for transporting the corn from Buffalo to New York was 12½ cents per bushel, ($887.50,) making in all $1,508.75, payable to the plaintiff by the consignee in New York, on the arrival and delivery of the corn.

The whole of the corn was transferred to "the Hudson," on reaching Albany, to be towed to New York, and the boat or barge Hudson was made fast to a steamboat, (or on the outside of another boat made fast to the steamboat, and also in tow,) for that purpose; and the passage, from Albany to New York, was begun on Saturday, the 14th October, 1854. In the night of that day the Hudson struck bottom, and was so injured that she leaked, and the pumps would not keep her clear of water. The boats were then headed towards the shore, and the Hudson grounded within about six feet of the dock at Castleton, where she was left by the steamboat.

The next morning (Sunday the 15th) the captain of the Hudson left for Albany, (leaving her in charge of a man who, with the captain, constituted her crew,) and on arriving at Albany notified the person who managed the plaintiff's business there. They visited the boat on Monday, but nothing was done towards saving the cargo. On that day, or the next, the Company in New York and their agent at Albany were notified of the accident. On Monday, the 16th, Gardner, the defendant's agent at Buffalo, was notified; and on Wednesday men from Albany,

employed by the defendants, "went to work to get the corn off." Neither the captain nor the plaintiff's agent at Albany did anything towards saving the corn, either Sunday, Monday or Tuesday.

The corn being taken out under the direction of the agents of the defendants, was sold at auction; and evidence was given tending to show that what was done in the removal and sale of the corn was done upon advising with the plaintiff's agent, and under a mutual agreement between the agents for both parties, that the defendants should take charge of the corn, for the benefit of whom it might concern, and that nothing was done without advising with the plaintiff's agent. The plaintiff's agent was present at the sale, and there was some evidence that the notice of sale stated that the sale was for account of whom it might concern. The defendants' counsel offered evidence to show how much of the corn was sound and how much was damaged. The Court excluded the evidence, and the defendants excepted.

The defendants' counsel also offered to show how much the corn produced at the sale. This was also excluded, and the defendants excepted.

It was admitted that the value of the corn at the place where the loss occurred, was 78 cents a bushel, at which rate 7,100 bushels would amount to $5,538, a sum greater than the sum insured ($5,400.)

The plaintiff proved the presentation to the defendants on or about the — day of November, as proof of loss and interest, the original policy; the policy book annexed, in which was entered the risk assumed upon the two cargoes, signed by Gardner; the two memoranda (or "bills of lading") of the two shipments by Deshler, above named, specifying the number of bushels; and the protest of the captain of the Hudson, (noted on the 19th of October, and extended on the 16th of November,) which stated the circumstances of the accident, and that she was in charge of the Underwriters on the cargo from the 17th of October.

The witness testified that the papers remained in the hands of the Company three or four days, and were then returned to him by the President. That they refused to pay the loss without consultation with their counsel. That the President did

not call his attention to any defects in the proofs of loss presented. He admitted the proofs of loss but declined to pay.

A motion was made for a dismissal of the complaint on the grounds:

1st. That no proof of *interest* had been given before suit brought.

2d. That no such interest, loss or damage covered or contemplated by the policy had been shown to exist in or to have been sustained by the plaintiff.

3d. That no such immediate notice of loss was given as required by the policy.

4th. That the owners and persons in charge of the boat and cargo after she was landed at Castleton having made no exertions and taken no care or precautions on Sunday, Monday or Tuesday, to preserve the cargo from injury, such neglects discharged the defendants.

The motion was denied, and the defendants excepted.

The defendants then gave evidence tending to show that the place at which the boat or barge Hudson was placed for towing, was too distant from the steamboat. That the Captain of the Hudson was informed that she drew too much water to tow there safely. That it was not a proper place to tow in, and he was so informed. That the Captain of the steamboat refused at first to permit him to tow in that situation, and told him to tow by a hawser. That the Captain of the Hudson refused, and said he would tow there or not at all. And was finally told, that if he made fast in the place where he was he must tow at his own risk.

Evidence was also given tending to show that two-thirds of the corn, or a large portion thereof, might have been taken out dry on Sunday, the 15th, and also on Monday, the 16th. That a large portion of the corn was then dry. That more than one of the witnesses proposed to the man in charge of the boat to take out the corn; offered to assist and to obtain the assistance of other men near at hand on Sunday morning. That the person in charge refused to allow it to be done. And that on Tuesday, the leak continuing, the corn swelled and opened the seams of the boat.

The defendants requested the Chief Justice to charge the jury that if they believed that the grounding of the Hudson was owing to her being too deeply laden to tow with safety in her place in the tow, and that such place was selected by the Captain of the Hudson, the defendants will be entitled to a verdict.

The request was denied, and the defendants excepted.

On that subject the charge was, that the position of the boat in the tow was of *no importance*, and that the responsibilities of the defendants were the same as if she had been towed in any other place which the captain of the tow might have assigned.

To this the defendants also excepted.

The defendants also requested the Court to charge, that the owner and persons in charge of the boat and cargo after she was landed at Castleton, having made no exertions on Sunday, Monday or Tuesday, and having taken no care or precaution to preserve the cargo from further loss or injury, such neglect discharged the defendants. Or, at all events from any greater loss than the actual loss which would have happened if such care had been taken.

The Judge refused to charge either proposition, and the defendants excepted.

On that subject the charge was: "It appears nothing was done to take care of the property by the assured, except the facts detailed by the witnesses, and the defense contend that by reason thereof, plaintiff cannot recover, especially as there was a refusal on his part to permit any interference. For the purposes of this trial, as there is no dispute about the facts on this point, I instruct you that such omission or refusal forms no obstacle to his recovery."

To this instruction the defendants excepted.

The defendants also submitted further requests to charge, that no such immediate notice of loss was given as was required by the policy. That no abandonment could legally be made by the plaintiff, and that, therefore, the acts of the defendants in taking possession and disposing of the property do not in themselves entitle the plaintiff to recover the full amount of the policy. That under the plaintiff's interest as disclosed by

the pleadings and proofs, he is only entitled to the difference between the value of the whole lot of corn and the net proceeds of the damaged portion. That the advance charges and freight from Buffalo, amounting to $1,508.75, are not covered by the policy, and form no part of the insurable value of the corn.

And to the several refusals to give these instructions, due exception was taken separately.

The charge on the last named topic was, that the jury should include the freight and charges in their verdict, if they found for the plaintiff, and to this the defendants excepted.

And in relation to the notice of loss, the charge was, "that such notice of loss as is required by the policy has been proved to have been given," and to this the defendants excepted.

The case was then submitted to the jury upon certain other questions of fact, under instructions satisfactory to the parties, and they found a verdict for the plaintiff for $5,207.50, (*i. e.*, for the full sum insured, less a sum of $192.50, which was established by the defendants to be due to them for premiums,) with interest on such sum of $5,207.50, amounting to $5,951.46.

And, thereupon, as the case is settled, the Judge ordered that the case should be heard in the General Term in the first instance on the points reserved at the trial, and exceptions taken by the defendants, with leave to the Court to dismiss the complaint if they should be so advised. Judgment in the meantime to be suspended.

Under this order the case comes now before the General Term for consideration.

Henry L. Clinton, for the plaintiff.

I. The notice of the loss and abandonment of the property insured, was given to the defendants immediately, as required by the policy. (*Rogers* v. *Traders' Ins. Co.*, 6 Paige, 583; *Boynton* v. *Clinton and Essex Mutual Ins. Co.*, 16 Barb., 254; *Sexton* v. *Montgomery Co. Mutual Ins. Co.*, 9 Barb., 191; *Bumstead* v. *Mutual Ins. Co.*, 2 Kern., 81; *Martin* v. *Fishing Ins. Co.*, 20 Pick., 389.)

II. The plaintiff, as common carrier, had a special property in their goods, and an interest in their safety, entitling him to effect

a valid insurance thereon, and to recover the whole value thereof in case of loss. (1 Phil. on Ins., §§ 173, 424; 2 Park., 235; *Van Natta* v. *Mutual Security*, 2 Sand., 490; *De Forest* v. *Fulton Ins. Co.*, 1 Hall, 84, 110; *Crowley* v. *Cohen*, 3 B. and A., 478; *Oliver* v. *Green*, 3 Mass., 133; *Barlett* v. *Notler*, 13 id., 267; Story on Bailments, § 507*a.*; 2 Kent. Com., 597, 598; *Chase* v. *Washington Mutual Ins. Co.*, 12 Barb., 595.)

A common carrier who insures against the risks for which he is answerable to another, is subject to the same rules and exceptions, and possesses the same right of abandonment as in original insurances. (1 Phil. on Ins., § 378; *Crowley* v. *Cohen*, 3 B. and Ad., 478; *Walker* v. *Mortland*, 5 B. and A., 171.)

III. The facts and circumstances warranted the plaintiff in an abandonment of the property insured.

The vessel and cargo were submerged, constructively destroyed, and the voyage broken up, by the direct operation of the perils insured against. (2 Phil. on Ins., §§ 1606, 1607, 1623; *Anderson* v. *Roy. Exch. Co.*, 7 East., 38; *Fuller* v. *McCall*, 1 Yeats, 464; *S. C.*, 2 Dall., 219; 2 Phil. on Ins., § 1493.)

The acts of the defendants in taking possession and disposing of the property, were not only a waiver of the form and sufficiency of the notice, but an *acceptance* of the abandonment. (2 Phil. on Ins., §§ 1692, 1693; *Rule* v. *Mercantile Ins. Co.*, 3 Mason, 27.)

The legal effect of the abandonment was to pass the interest of the insured in the property, and all its incidents to the insurers, who could not restrict their liability by assuming to dispose of it, "on account of whom it may concern." (*Gardner* v. *Columbian Mutual Ins. Co.*, 7 Johns., 520; *Pierce* v. *Ocean Ins. Co.*, 18 Pick., 83; PUTMAN, J., in *Badger* v. *Ocean Ins. Co.*, 23 Pick., 347; *Gould* v. *Citizens Ins. Co.*, 13 Miss., 324.)

IV. The plaintiff having abandoned the property as a total loss, the omission or refusal of his agents or servants to take care of it, or make exertions to preserve it from loss or injury, forms no obstacle to his recovery. (2 Phil. on Ins., §§ 1490, 1491, 1730, 1732; *Gould* v. *Citizens' Ins. Co.*, 30 Miss., 524; *Gardner* v. *Columbian Ins. Co.*, 7 Johns., 520.)

V. Where the immediate cause of the loss to a vessel is a peril expressly insured against, it is not a defense that the negligence

or mistake of the master and crew occasioned such peril, or brought her within it, supposing that she is provided with a competent master and crew, and there is no want of good faith and honesty of purpose. (2 Phil. on Ins., § 1049; *Mathews* v. *Howard Ins. Co.*, 1 Kern., 3.)

VI. The freight and charges might properly have been recovered if the sum insured had exceeded the actual value of the property. But here the value exceeded the amount of the insurance. The policy, in terms, makes actual value the measure of damages, and the verdict is for the sum insured, which is less than the value. The verdict is therefore right.

T. C. T. Buckley, for the defendants.

I. The complaint should be dismissed.

1. No proof of interest was given, as required by the policy, the only papers ever presented to the Company being the proofs of loss.

2. No such interest, loss or damage as was covered by, or contemplated in the policy, was shown to have been sustained by the plaintiff.

The contract of insurance in the case of carriers being eminently a contract of indemnity, his liability should affirmatively appear. (*Chase* v. *Wash. Mut. Ins. Co.*, 12 Barb. R., 595; 14 Barb., 524.)

3. The neglect of the owners and persons in charge of the boat, to take any care or precaution to preserve the cargo from further injury, and their refusal to permit it to be done, was a violation of the duty they owed to the insurers, which discharges the defendants. (Parsons' Mer. Law, 470–472; *Schieffelin* v. *N. Y. Ins. Co.*, 9 J. R., 21; *Mathews* v. *Howard Ins. Co.*, 1 Kern., 15.)

II. The judge erred in holding that the acts of the defendants, in taking possession of and disposing of the property, in themselves entitled the plaintiff to recover the full amount of the policy

1. The acts in themselves are not sufficient to entitle the plaintiff to recover a total loss. (2 Phil. on Ins., p. 389, No. 1692.)

2. The plaintiff could make no abandonment, and transfer no title. (Parsons' Ins. Law, 468; 2 Arn. on Ins., 1161; 1 Phil. on Ins., § 424.)

3. All the plaintiff can claim under the insurable interest which, admitting him to be a carrier, he would possess, is to be indemnified for what the owners of the property could recover against him. (2 Sand. R., 495.)

III. The judge erred in holding that the position of the boat in the tow, selected by the Captain of the plaintiff, was of no importance. (*Mathews* v. *The How. Ins. Co.*, 1 Kern., 15; 6 Ellis & Bl., 937, 952.)

IV. The advanced charges and freight from Buffalo were not as matter of law covered by the policy, and form no part of the insurable value of the corn. (2 Phil. on Ins., 44.)

BY THE COURT—WOODRUFF, J. The defendants received the papers which were submitted to them as preliminary proofs of loss and of interest, retained them for examination three or four days, and then declined paying. No intimation was given that there was any defect in these preliminary proofs. On the contrary, the witness says the President admitted the papers as proofs of loss, but declined paying without consultation with their counsel. It is well settled that when the assured in good faith submits his preliminary proofs with a view to set the time a running (the sixty days) after which the insurance is payable, and they are received by the insurers and examined, he is entitled to be treated with reasonable frankness, and if the insurers admit their sufficiency as preliminary proofs, they cannot afterwards, when the sixty days have elapsed, and an action is brought to recover the loss, raise an objection to those proofs which might, had any defect been pointed out have been supplied or obviated. The insurers here, we think, must be held to have waived any defect in the proofs even if they were defective.

We think moreover that they were quite sufficient. If the insured had any insurable interest in the property, it appeared by the papers, and the loss was also established *prima facie* by the Captain's protest. It is not necessary that the assured should furnish his proofs in a form which would entitle them to be read

as evidence of the facts therein certified, on the trial of the action. (*Lawrence* v. *The Ocean Ins. Co.*, 11 J. R., 242; *Talcott* v. *Marine Ins. Co.*, 8 id., 308; 4 Wend., 83; 3 Sandf., 26.)

The policy and the entries by the defendants' agent showed the insurance and specified the property. The memoranda of shipment showed the quantity and the fact of shipment. These papers showed that the plaintiff was a common carrier and received the grain for transportation, the destination, and for whose account the grain was shipped, and the amount of the charges and freight. The protest showed the fact of loss or damage, and the company by its agents having previously taken the grain from the barge, and it having been sold under their direction, no fact was wanting to them, which was material, to show what the interest was which was the subject of insurance, or the fact of loss. The proofs were the original documents, and such as might reasonably be deemed satisfactory; if the Company wished for any more precise or formal proofs they should have required them. And this is especially true where, as in this case, the policy does not prescribe any form or mode of authentication of these proofs.

The inference justly deducible from the acts and declarations of the Company was, not that they refused to pay because the preliminary proofs were defective, but because they doubted the right of the plaintiff to recover. (See *Miller* v. *The Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 286, and cases there cited; and *Peacock* v. *New York Mutual Ins. Co.*, 1 Bosw., 338.)

If therefore the plaintiff had any insurable interest, and had sustained any loss or damage which was covered by the policy, the defendants were not entitled to a dismissal of the complaint.

A common carrier may insure goods entrusted to him for transportation for his own protection. He has a special property therein, and an interest which is the proper subject of insurance. (*Van Natta* v. *The Mutual Security Ins. Co.*, 2 Sandf. S. C. R., 490, and cases therein cited; *Chase* v. *Washington Mutual Ins. Co. of Cincinnati*, 12 Barb., 598.)

Had the insurance been upon his interest as common carrier only, it might be material to inquire whether the cause of loss in this instance was such that he was liable to the owners for the value of the goods. (3 Barn. and Ad., 478.) But the insu-

rance here was against any loss or damage he might sustain on cargoes *on account of himself or others.* The true construction of this language, in connection with the declaration of the perils and risks assumed, viz.: of the seas, canals, &c., &c., and all other perils, losses and misfortunes that shall come or happen to the hurt, detriment or damage of the goods, &c., laden on board, is, we think that the insurance was as well on his own account as on account of the owners, and although the loss might happen from a cause for which he would not be responsible to the owners, still if it was caused by a peril insured against, the Company are liable. The language is peculiar; it cannot be satisfied without applying it to losses sustained on cargoes held on account of other parties. And in this respect it is strikingly like an insuranee by a factor on goods belonging to himself or held in trust or for account of others. And where the policy plainly imports an insurance upon the goods themselves, and not merely upon a special interest therein, the assured may recover their full value. (*De Forest* v. *The Fulton Fire Ins. Co.*, 1 Hall Sup. Crt. R., 84.)

This construction is fortified by the fact that the defendants were aware, when the insurance was made, that the plaintiff was a common carrier. They insured goods which he should transport as such, and they, by the very words of the policy, took upon themselves perils and risks of loss by causes for which he would not be responsible to the owners of the goods, and excluded nearly all losses arising from causes for which he would be responsible.

A policy should be construed rationally, and we cannot assume that the defendants received, or the plaintiff paid, a premium for insuring against perils, with full knowledge that if a loss was caused thereby, the insurers would not be liable; and yet this would be the effect of the transaction, if the defendants were not to pay for any loss unless it arose from a cause for which the plaintiff was liable to the owners.

We think the policy was a contract with the plaintiff, in view of his special interest in the property as carrier, but also upon the goods themselves, covering their value to the amount insured, for the benefit of the plaintiff and of those for whose account he held the goods. That they are therefore liable for the value of the property. Whether the plaintiff is, in this aspect of the case,

to be regarded as a trustee of an express trust in so far as his recovery will enure to the benefit of the owners of the goods, or whether the owners should be parties to the suit, it is not necessary to inquire, since no such question has been raised, and the objection that there is a defect of parties, is waived, if not made by answer or demurrer. (See 2 Sandf., *ubi supra*, and *Grinnell* v. *Schmidt*, id., 706; *Stilwell* v. *Staples*, 6 Duer, 63; *Bogart* v. *O'Regan*, 1 E. D. Smith, 590.)

The plaintiff received notice of the accident at Buffalo, by telegraph, on Sunday or Monday after it occurred, and as early as Monday the defendants' agent was notified, and through him the defendants were informed thereof on Tuesday. The accident happened in the night of Saturday. Considering the fact that the plaintiff lived at Buffalo, and that the accident occurred near Albany, it is impossible to say that even extraordinary diligence was not used to comply with the requirement to give immediate notice.

There is nothing in the claim that this was not done. This ground for dismissing the complaint was properly overruled.

The further ground of the defendants' motion, viz., that the defendants were discharged from their obligation by the omission of the plaintiff's agents to make exertions and take precautions, &c., to preserve the cargo from further loss or injury during the three days, Sunday, Monday and Tuesday, which elapsed before the agents of the defendants arrived, was no reason for granting a dismissal of the complaint. Whether these facts might operate to limit the recovery, will be considered in connection with the charge and the defendants' exceptions. But such neglect did not deprive the plaintiff of a right to recover for damages already sustained. There was no such condition in the policy, nor is there any rule of law by which, in the absence of some provision of that import in the policy, a forfeiture of all right to recover anything results from negligence in the care of the property after it is injured by a peril insured against.

There was no error in rejecting evidence offered to prove that the plaintiff had assigned his claim before suit brought, and was not the real party in interest. The pleadings did not raise any such question. If the suit was not brought in the name of the

real party in interest, the objection was waived by its not being set up as a defense.

Neither did the order drawn on the defendants, requesting them to pay N. H. Wolfe & Co. for the corn, retaining for the plaintiff the freight and charges, furnish any reason for dismissing the complaint. It did not necessarily operate as a partial assignment of the claim, and if not paid, it wrought no change in the rights of the parties.

To the proper consideration of many, if not all of the remaining exceptions, it is necessary first to notice the obvious ground upon which the rulings excepted to proceeded. And it seems just, also, to say that these rulings were evidently made, not as an expression of the deliberate opinions of the eminent jurist, (now deceased,) before whom the trial was had, but were in a measure *pro forma*, with a view to the submission of the controverted questions of fact to the jury, and to leave to the General Term the determination of the questions of law arising upon the facts, which he deemed undisputed, and in relation to which the exceptions were taken.

The ground of many of these rulings seems to have been that the acts of the plaintiff's agents amounted to an abandonment, (as understood in the law of insurance,) to the underwriters, and that the acts of the defendants, by their agents, amount to an acceptance of that abandonment; so that the grain insured became the property of the defendants, and they became liable to pay, (to the extent of the sum insured,) the value thereof.

Under this view of the subject, it was deemed wholly immaterial what portion of the corn was sound when taken from the barge, and what portion was damaged; and evidence on that subject was excluded. In the same view, it was wholly immaterial what price the corn produced at the sale; for if it had become the defendants' property, their disposal thereof, at whatever price, could not impair the plaintiff's right to recover its value, to the extent of the sum insured.

So, also, assuming that the defendants had accepted an abandonment, this may have been deemed a sufficient reason for holding the defendants concluded, and hence to have waived any objection to the manner in which the captain of the Hudson had been guilty of negligence in selecting his position in the tow, and

any defense arising out of any alleged neglect of the plaintiff's agents in taking care of the property, and their refusal to permit the corn to be landed when that was proposed.

We think there is nothing to warrant the idea of abandonment, and an acceptance thereof, disclosed by the proofs.

Indeed it is not clear that the plaintiff had any such interest in the property, or any such authority over it, that he could abandon it to the insurers. (*Van Natta* v. *The Mutual Security Ins. Co.*, 2 Sandf., 495.) Had the actual owners of the property claimed the entire proceeds of the sale, we do not perceive that the defendants could have resisted that claim by asserting title acquired through the plaintiff.

But the proofs show no abandonment or attempt to abandon, if the plaintiff's authority were conceded. Although no particular form is necessary, an abandonment must be unequivocal and explicit. Here there is no pretence that any actual notice of an intention to abandon was given, nor that the plaintiff did or said anything affirmatively, indicating an intention to abandon. It is not, therefore, the case of an attempt to abandon, or of an abandonment, defective in respect of the sufficiency of the notice actually given, where the abandonment has been acted upon by the insurer, so as to waive defects in the notice and constructively to accept the abandonment. The most that can be claimed by the plaintiff is that his agents did nothing towards the care or preservation of the property, while the agents of the defendants, on learning its condition, took measures to save it, and to dispose of it, as by one of the provisions of the policy was stipulated.

But there was distinct testimony that what was done by the defendants was not done under any idea of making the property their own, or of incurring any responsibility founded on any such idea, and that this was known to the plaintiff's agents, and assented to by them.

Babcock, one of the witnesses, and agent of the defendants, testifies that he saw James Savage, the agent of the plaintiff, "who transacted his business at Albany," before the agents of the defendants intermeddled with the grain, and that J. Savage "told us what was best to do, which we carried out to the best of our knowledge for the benefit of all concerned," and got scows and boats and took out the corn. "We did nothing without advis-

ing with him." "It was mutually agreed we were to take charge of the corn for the benefit of whom it may concern; Savage assented * * and was present at the adjourned sale of the corn."

This testimony is corroborated by Vanderhook, the defendants' surveyor.

James Savage, though examined as a witness, does not contradict this. If there are any circumstances at all in conflict with this testimony, (which, however, we do not discover,) still it must be taken as true, or the question should have been left to the jury, if the plaintiff insisted that the acts of the parties amounted to an abandonment and an acceptance thereof.

Again the policy in terms provided for the ascertainment of the loss by an examination which could only be had by landing the corn, and for the sale of the damaged portion, to ascertain for how much the Company was liable.

Moreover, the plaintiff had been apprised of the accident. If the authority of James Savage to act for him were doubtful, we have still no hesitation in saying that when the plaintiff took no measures to save the property, and his agents neglected to give it any attention, the defendants were not bound to suffer it to remain, and go to decay at the peril of being charged with the same consequences that would result from having accepted an abandonment, viz.: with having made the property their own and become liable, as for a total loss.

And finally, no abandonment, nor anything tantamount thereto, is alleged in the complaint; a loss actually total is the sole ground of claim there asserted.

The idea of such an abandonment must therefore be excluded from our consideration in disposing of the defendants' exceptions. And thereupon it becomes, we think, clear that the inquiries, what portion of the corn was damaged and what portion was not, and how much the damaged portion was damaged, became material and proper; and the sale at auction being the agreed mode of ascertaining the amount of the loss on such damaged portion, the price which it produced was also competent proof of the extent of the loss.

As *insurers*, the defendants were "liable for the loss on the damaged portion *only*." These are the very terms of the policy.

No proof was given respecting the disposition made of the proceeds of the sale. Perhaps we ought to assume, under all the circumstances, that the whole proceeds are in the defendants' hands. If so, then under the arrangement they hold them for the benefit of whom it may concern. They are not prosecuted in this action to recover those proceeds as such, and so far as those proceeds arose from the sound corn, at least, there are no allegations in the complaint suited to a recovery for them; for them they are not liable as insurers, and the measure of their liability depends not at all upon the policy or the sum insured, but upon the amount of actual proceeds received by them on the sale.

So, also, laying the question of abandonment and its acceptance out of view, the question whether the captain of the boat was guilty of negligence, or, in the terms of the policy, "want of ordinary care and skill" in insisting upon having the boat towed in the position it was, assumes importance.

The policy expressly excludes liability for "perils, losses and misfortunes arising from or caused by want of ordinary care and skill in lading or navigating said boat."

It is undoubtedly true, that in general where a loss arises from a peril insured against, the title of the assured to recover cannot be defeated by proof of mistake or error in judgment, or even negligence by the master or mariners employed in navigating the vessel, which brought the vessel within the peril; not because negligence and want of skill are perils insured against, but because, in general, the law looks to the immediate cause of loss, the peril which is insured against, and not to the secondary or remote cause, the negligence. (*Mathews* v. *The Howard Ins. Co.*, 1 Kern., 3.)

But parties may specially agree upon a different rule, and this, we think, they did in this case. The defendants excepted a loss arising from want of ordinary care and skill in lading or navigating said boat. Now suppose the boat had been laden so heavily as to make the attempt to tow her on the Hudson river an act of manifest inprudence, evincing an entire want of skill or ordinary prudence, we should not hesitate to say that the defendants had protected themselves against the consequences of a loss which, but for such improper lading, would not have

occurred, although the immediate cause was her encountering a storm, in which, in that condition, she could not be kept afloat.

We are not able to say, upon the evidence, that the case is so clear upon the question whether the captain was guilty of a want of ordinary care and skill, that the jury should have been directed to find for the defendants on that ground, or that we should direct a dismissal of the complaint, pursuant to the leave reserved at the trial. There is some evidence tending to show that the conduct of the captain in this respect was not of the character claimed, and that such a condition of the tow was not unusual. We think that question should have been submitted to the jury.

So, also, we think that the negligence of the plaintiff and his agents in taking no care of the property and in refusing to permit it to be taken from the boat when partially submerged, was material in determining the extent of the defendants' liability, and that the charge was in this respect erroneous.

Indeed, the charge is now sought to be sustained only on the ground of an abandonment, which has already been considered.

The assured is always bound, when the circumstances only warrant a claim for a partial loss, to use ordinary care in preserving the property insured, after the danger is past. He is not at liberty, by sheer neglect, to suffer the goods to decay, and so needlessly aggravate the loss. To sanction this would be to permit the assured and his agents to convert a partial into a total loss by their own voluntary neglect. On the contrary, where the insurance is on a vessel, if repairs can be made, it is the duty of the master to repair. If the insurance is on freight or goods, if the vessel be lost and the goods are saved, it is the duty of the master to forward them by another vessel, if one can be procured, and on a principle of even more obvious obligation, he is bound to use ordinary care in preserving the goods from needless deterioration. These principles are, we think, too well settled to require extended discussion.

If, then, as one witness testifies, the means of removing the corn were at command, and were even tendered, and two-thirds of the corn might have been removed on Sunday and Monday, dry and uninjured, it was gross neglect to decline offers of assistance, and keep the corn on board until, by the swelling of the

portion that was wet, the seams of the vessel were opened and further damage was thereby caused.

There may be difficulty in determining how much of the damage to the corn resulted from this negligence, but if the plaintiff is in fault, the defendants should not be made to suffer thereby. The principle is not altered in his favor by a difficulty in proving the facts, when that very difficulty arises from the plaintiff's fault.

The judge directed the jury to include in their verdict, if they found for the plaintiff, the amount of the charges paid on the corn by the plaintiff, and his freight. If the company were in truth liable for a total loss, and the value of the corn was (as it was admitted to be), of a greater sum than the amount insured, this instruction could not affect the result, and was therefere wholly immaterial; for whether the freight and charges were included or not, the plaintiff was entitled to recover the sum insured, less the defendants' counterclaim, and no more.

But if the plaintiff was entitled only to recover for a partial loss, then it is material to consider the propriety of this instruction. And here, we think, the terms of the policy are conclusive. The insurance was on goods, and not on *freight.* The policy declared that the loss should be ascertained "by separating the sound from the damaged portion—the company being liable for the loss on the damaged portion only—to be ascertained by appraisement or a sale at auction, the loss to be estimated according to the true and actual value of the said property hereby insured, at the time the same shall happen." Here the elements of computation are given, and they clearly exclude the idea of increasing the amount by adding charges or freight, *ipsis nominibus.*

On the contrary, by adopting the actual value at the time as the standard, they do practically and presumptively include freight and charges in that actual value; because the value is presumptively enhanced to the full extent that charges have been incurred and freight earned; and as to freight not earned, we think that it was not covered by this policy.

For these reasons the verdict must be set aside and a new trial ordered, the costs of the trial and of the hearing at the General Term, to be costs in the cause, and abide the event of the suit.

Ordered accordingly.

JAMES W. ELWELL, Receiver of The Reliance Mutual Insurance Co., Plaintiff, *v.* EBEN B. CROCKER and GEORGE WARREN, Defendants.

1. The maker of a premium note given to a Mutual Insurance Company for the nominal premium upon an open policy executed to cover such risks as may be afterwards indorsed thereon, is liable to the Company on such note only to the amount of the actual premiums upon risks assumed by the Company, and indorsed on the policy.
2. The receiver appointed upon the insolvency of the Company can recover no greater amount.
3. Where a Mutual Insurance Company is organized under the statute of 1849, providing for the incorporation of voluntary associations by filing a certificate with the Secretary of State, and a copy of the charter agreed upon, notes given by subscribers in pursuance of agreements to insure for the premiums in advance, which notes by the fifth section of the act, are to be considered a part of the capital stock, are valid and collectible in the hands of the Company, or in the hands of the receiver if the Company become insolvent, whether risks have been actually taken and premiums earned to the amount of such notes or not.
4. Such notes last named are subscription notes, and are held for the security of dealers, and may be negotiated or collected for the payment of losses and debts, and are valid obligations to the full amount thereof, whether any premiums have been actually earned or not.
5. But when the Company has been duly organized under the act, and has received from subscribers the requisite amount of capital, either in cash or in notes given in advance for premiums under agreements to insure as provided in the said fifth section, the Company may conduct its business with ordinary dealers, subject to the same principles as though incorporated specially either on the mutual plan or with a capital stock paid in cash, and the makers of premium notes give in advance upon open policies are only liable thereon to the amount actually earned.
6. A stipulation in the charter of a mutual company voluntarily associated and incorporated under the act that "notes received in advance of premiums on open policies shall in no case be deemed liable for any losses that may accrue beyond the actual earnings on such policies," is not inconsistent with the statute, but is binding on the Company and on its receiver if the Company is insolvent.
7. The distinction between "subscription notes" and "premium notes," and the rights and liabilities of the makers thereof respectively, and of the Company, and its receiver considered.

(Before SLOSSON, WOODRUFF and PIERREPONT, J. J.)

Heard, Oct. 8th; decided, Dec. 11th, 1858.

THIS action is brought upon a promissory note for $2,506.35, made by the defendants, payable to the Reliance Mutual Insurance Company or order, seven months after date, and dated August 22d, 1854.

Before the maturity of the note the payees became insolvent, and on the 28th day of March, 1855, the plaintiff was appointed receiver of the goods, property, &c., of the Company, in and by proceedings had in the Supreme Court, and an order made therein. And among the assets which came to his hands by virtue of that appointment, was the note on which the action is brought.

The only defense set up in the answer in relation to which any proof was given, is that the note was given in advance for premiums on an open policy of marine insurance effected by the defendants with the Reliance Mutual Insurance Company. That no part of the premiums for which the note was given was ever earned, and no risks were ever taken by the Company after the giving of the note. And that the Company became publicly insolvent soon after the note was given, and before assuming or taking any risks under the said policy.

The action was brought to trial before Mr. Justice BOSWORTH and a jury, on the 23d of December, 1857.

The defendants proved that the Reliance Mutual Insurance Company commenced business about the 15th of August, 1853. That on the 20th of January, 1854, the defendants effected an insurance with the Company by an open policy for an aggregate sum of $146,910, to cover risks which might thereafter be indorsed on the policy, the premiums on risks to be fixed at the time of indorsement. That the defendants at that time gave the Company a note in advance for the premiums to be earned thereon, to the amount of $2,939.46, payable seven months after date. That at the maturity of that note, the premiums upon risks which to that time had been indorsed upon the policy, amounted to only $433.11, which was paid by the defendants, and the policy was thereupon renewed, and the note now in suit was given by the defendants as an advance to cover further premiums on risks which might thereafter be indorsed on the policy, but that in fact no risk was indorsed on the policy; no insurance was effect-

ed by the defendants with the Company, and no premium was ever earned under that policy after the note was given.

The Vice-President of the Company testified that "the Company had a capital of subscription notes amounting to about $100,000, which were raised by a subscription contract containing the terms on which they were given, and which were drawn in a different form from the premium notes. That the subscription notes were entitled to a bonus of five per cent per annum from the Company, but the premium notes had no bonus."

That the Company "had a large amount of notes similar to this one in suit, given in advance for premiums on open policies. Probably the amount first and last was $300,000 and over."

It further appeared that the Reliance Mutual Insurance Company was professedly organized under the act of April 10th, 1849, entitled "An Act to provide for the incorporation of insurance companies." (Sess. Laws of 1849, p. 441, chap. 308.)

The declaration and charter agreed upon by the associates under which such organization was effected, declare that the business of the Company should be

1. To make insurance on vessels, &c., (otherwise described as taking marine risks.)

2. To make insurance on buildings, &c., (otherwise described as taking fire risks.)

It provided for a cash capital of $250,000, and that the subscribers to this capital should be entitled to all the earnings from fire risks and the interest on investments of such capital and all earnings in the fire department. That all losses in the fire department should be borne by and liquidated from receipts of fire premiums and earnings of capital stock; and all marine losses and losses on inland navigation risks and expenses should be paid from earnings of the marine department; but should losses accrue beyond the actual earnings of the marine department, then the capital stock of the Company should be liable to make good such deficiency.

And that the profits arising from the business of marine insurance should be *divided among the marine policy holders* (in the form of a per centum upon the premiums received and earned); in the first instance by issuing scrip certificates to them bearing interest at six per cent per annum, and ultimately, when the

accumulated earnings in the marine department should amount to $500,000, then such certificates might be redeemed by the Company in money. All interest upon the accumulated earnings in the marine department to enure to the benefit of that department only.

By the ninth section it is provided as follows: "This Company shall have power to receive notes for premiums in advance of such persons as may intend to receive its policies, as well as the usual premium notes for specific risks, and may negotiate such notes for the purpose of paying claims or otherwise in the regular transaction of its business; *but notes received in advance of premiums on open policies shall in no case be deemed liable for any losses that may accrue* beyond the actual earnings on such policies."

The other provisions of the declaration and charter do not seem to be material to the questions to be considered.

Upon these proofs the parties rested the case, and "the jury under the direction of the Court, found a verdict for the plaintiff for" (the amount of the note in the suit, with interest,) "$2,988.74, subject to the opinion of the Court at General Term; a case to be made with liberty to the Court to order judgment for the defendants; the counsel for the parties agreeing, at the time, in open court, that judgment might be given by the Court, at General Term, for the defendants, if so ordered, and in that event, the case to be so drawn as to state that the jury at the trial were directed to and did find for the defendants, and on exception to such direction by plaintiff's counsel."

William H. Leonard, for the defendants.

I. The charter of the Company is a part of the contract with the defendants. The note in suit was given on the terms and conditions offered by that charter. The ninth section of that charter provides that "notes received in advance of premiums on open policies, shall in no case be deemed liable for any losses that may accrue beyond the actual earnings on such policies."

The Company and its dealers, creditors as well as debtors, are bound in their rights and liabilities by the provisions of this public act of organization.

II. The note in suit was given on an open policy, upon which no premiums were ever earned. A recovery would be a violation of the conditions on which the note was given, and a fraud on the defendants.

III. The judge should have directed the jury to find a verdict for the defendants, and judgment ought now to be entered accordingly, with the costs of the defense.

E. C. Benedict, for the plaintiff.

In mutual insurance companies, notes given in advance of premiums are to be considered as part of the capital stock, and whether the premiums be earned or not, those notes are security to all persons for the obligations of the Company, and must be paid to the receiver to be applied and distributed by him according to law. (*Deraismes* v. *The Merchants' Ins. Co.*, 1 Comst., 371; *White* v. *Haight*, 16 N. Y. R., 310.)

By the Court—Woodruff, J. It is proved in this case, without contradiction, that the note upon which the action is brought, was given in advance for premiums of insurance upon an open policy, intended to cover such insurance as might, after the note was given, be effected by the defendants with The Reliance Mutual Insurance Company, and be evidenced by indorsements upon such policy.

And the arrangement between the defendants and the Company plainly contemplated the payment by the defendants, at the maturity of the note, of such sum only as had then been earned for premiums upon the risks, which had, up to that time, been assumed by the Company and indorsed on such policy.

Considering the rights of the Company and of the defendants, without reference to the provisions of the public statute, under which the Company was organized, it is clear that the Company could collect from the defendants no greater sum than the amount of premiums earned by the Company.

On this subject, what is called the charter of the Company—its constitution, as agreed upon by its founders—is explicit in providing, that although the Company might negotiate notes received for premiums in advance, from persons who might intend to receive its policies, for the purpose of paying claims or

otherwise in the regular transaction of its business, yet that "notes received in advance of premiums on open policies, should in no case be deemed liable for any losses that may accrue beyond the actual earnings on such policies."

This provision describes the note given by the defendants, and now in suit. And although by its terms the defendants took the hazard of being compelled to pay their note in full, had it been negotiated to a third person by the Company in payment of claims, in due course of business, and of seeking reimbursement from the Company, in so far as the amount had not been earned; yet the Company itself could not require the payment of more than had been so earned upon risks indorsed on the policy for which it was given.

Under the terms of the charter, the notes and the policy were not independent contracts, so that the Company could collect the notes, whether the premiums already earned were greater or less, and treat the open policy as itself the consideration of the note. As between themselves, the note and the policy are to be deemed in subordination to the provisions of the charter, and the note payable, to the Company, only to the extent of premiums earned.

Indeed, if it were not in terms so provided in the charter, we think it clear that even if it were conceded that the Company might require the defendants to continue their insurance until the amount provided for in the open policy had been insured; the Company from time to time receiving premiums actually earned, and renewing the premium note for the amount unearned; still if the Company ceased its business and became unable longer to insure the defendants' property, they could require the defendants to make no further payment. And if the defendants' note is to be treated as a "premium note," as distinguished from a "subscription note," as hereinafter explained, then the defendants were not bound to continue their insurance, but might at any time require the note to be surrendered, on paying the premiums already earned. (*Brouwer* v. *Hill*, 1 Sandf., 629.)

This view of the constitution of the Company, and of the contract between the parties, under which the note in suit was given, renders it material to inquire whether there is anything in the nature or scheme of the organization of the Company, or in the

public statute under which that organization was made, which makes notes so received by the Company a security for the payment of the debts of the Company, or entitles the receiver of the Company acting primarily for the benefit of creditors, to collect the notes, whether the premiums have been earned or not?

The statute of 1849, (Sess. Laws of 1849, p. 441, chap. 308,) permits an organization for the purposes for which The Reliance Mutual Insurance Company was formed, and requires the associates to file a declaration in the office of the Secretary of State, with a copy of the charter proposed to be adopted by them, and, on complying with the requirements of the act, it makes them an incorporated company.

It permits the associates, after publishing a required notice and filing their declaration and charter, to open books for subscription to the capital stock of the Company, and to keep the same open until the full amount specified in the charter is subscribed; or in case the business of such Company is proposed to be conducted on the plan of mutual insurance, *then to open books to receive propositions and enter into agreements in the manner and to the extent hereinafter specified.*

The fifth section of the act then proceeds, (so far as it is material to this case,) in these terms: "No joint stock company organized for the purposes mentioned in this act, shall be organized in the city of New York * * * with a smaller capital than $150,000; nor shall any company formed for the purpose of doing the business of marine or fire or inland navigation insurance, on the plan of mutual insurance, commence business, if located in the city of New York, * * until *agreements* have been entered into for insurance with at least one hundred applicants;—the premiums on which, if it be marine, shall amount to $300,000; or if it be fire or inland navigation, shall amount to $200,000; and notes have been received in advance for the premiums on such risks, payable at the end of, or within twelve months from date thereof, *which notes shall be considered a part of the capital stock* and shall be deemed valid, and shall be negotiable and collectible for the purpose of paying any losses which may accrue or otherwise."

The Legislature have thus proposed a double scheme, in each of which security is provided for dealers with the corporations

organized under the act. One authorizes an incorporation, with a cash capital paid in; the other authorizes association upon the plan of mutual insurance, on the terms prescribed in the act.

The one contemplates the contribution, (by the associates and such as may become subscribers,) of a cash capital, to an amount not less than $150,000, which shall be the security and form the reliance of those who may deal with the Company, for the payment of all claims arising from losses or otherwise.

The other contemplates the making of agreements for insurance by at least one hundred applicants, and the contribution by them of notes, given in advance for premiums thereon, to the amount of $300,000: which *notes* shall be considered a part of the *capital stock*. And these notes become and are constituted the security of the dealers, by being made collectible for the purpose of paying losses, &c., whether the agreements for insurance are performed or not, and whether, therefore, the premiums for which the notes are so given are earned or not.

Under this last mentioned arrangement it is obvious that those who enter into such agreements cannot withdraw until the whole amount which they have subscribed has been paid in premiums to the Company, and their notes meanwhile stand in lieu of capital paid in. By this means the result is made certain, (if the agreements be performed or the subscribers continue solvent, which the act seems to assume,) that a capital of at least $300,000 will accrue from subscriptions and constitute the capital, for the security and protection of its dealers.

When the requisites of the act have been complied with, there appears no legal objection to the making of contracts of insurance by the corporation with parties desiring to insure, upon any terms to which they may agree, *e. g.*, if the Company have organized upon the basis of a cash capital, they may take specified single risks receiving the premium therefor in money or by note for the exact amount, giving such credit as shall be agreed upon; or they may, for the convenience of dealers, issue open policies, applicable only to such particular risks as may be indorsed thereon, protecting themselves by receiving a note for the aggregate premium, to be reduced from time to time as premiums are earned, and with a liability of the dealer to pay to the Company only such premiums as may be payable for the risks

so indorsed. And where the organization of the associates and subscribers was upon the basis of mutual assurance, (the requisites of the act being complied with,) they may in like manner take single specified risks or issue open policies with the like results. In either case the design of the Legislature is accomplished; the dealers are made presumptively secure by the capital paid in or the premiums subscribed and agreed to be paid as capital; and this being done, all dealers stand upon an equal footing in respect of security for the payment of losses; those who pay their premiums in money on specific risks singly insured, and those who receive open policies and make the risks specific, by indorsements thereon from time to time, as the exigencies of business require.

This construction of the act of 1849 shows the difference between what are in common parlance called "subscription notes," (*i. e.*, notes given in advance for premiums on insurance which the makers have agreed to effect with the Company, and which are by the statute to be considered a part of the capital stock,) and notes received by the Company in due course of business after its organization for premiums upon open policies to be earned as risks may from time to time be indorsed thereon, and which are called in general phrase "premium notes."

The first class are by the terms of the statute made negotiable and collectible for the purpose of paying any losses which may accrue or otherwise. The others are subject to the ordinary rules of law governing the liabilities of the makers of promissory notes, and as between them and the payees, or any one who claims by no higher equity, subject to the agreement between them.

This same distinction arose and was acted upon in defining the liabilities of the makers of notes of each description under various special charters granted before the act of 1849 was passed. (*Brouwer* v. *Appleby*, 1 Sandf. S. C. R., 158; *Hone et al.* v. *Allen et al.*, id., 171; *Hone et al.* v. *Folger et al.*, id., 177; *The Same* v. *Ballin et al.*, id., 181; *The Merchants' Mutual Ins. Co.* v. *Leeds*, id., 183; *Deraismes* v. *The Merchants' Mutual Ins. Co.*, 1 Comst., 371; and especially *Brouwer* v. *Hill*, 1 Sandf., 630,) which last case recognizes not only the difference between subscription notes and premium notes taken on open policies in the ordinary

course of business, but also the right of mutual companies to deal in this respect with their customers on the same terms as to the premiums; payable on such policies only to the extent of the risks indorsed thereon, as other companies may do.

The act of 1849, in its leading provisions, so far as they contemplate the plan of mutual insurance, is strikingly like the special charters under which the above cited cases arose. (Laws of 1842, p. 261; Laws of 1843, pp. 66, 73, 50.) And when the particular provisions of the charter agreed upon by the associates forming The Reliance Mutual Insurance Company are read in connection with the act, the resemblance is still nearer.

The provisions of the fifth section of the act of 1849 above recited, here mainly relied upon by the plaintiff's counsel, are, we apprehend, to receive a construction similar to the twelfth section of those special charters. True, it does not say that the notes therein mentioned may be taken "for the better security of its dealers," but it makes them part of the capital stock; which works the some result, in connection with the authority to negotiate and *collect* them for the purpose of paying losses, &c.

The difference (thus recognized and sanctioned) between subscription notes and premium notes received upon open policies, is also, we think, contemplated and provided for in the sixth section of the charter of the Company to whom the note in question was given. It provides for "notes received for premiums in advance of *such persons as may intend* to receive its policies" * * These are subscription notes. The same notes provided for in the fifth section of the statute, and almost in the words of the statute, it provides that the Company may negotiate such notes, for the purpose of paying claims or otherwise, in the regular transaction of its business; just as it may "the usual premium notes for *specific* risks," which are of course the Company's property, and payable when due. "But notes received in advance of premiums on open policies shall in no case be deemed liable for any losses that may accrue beyond the actual earnings thereon."

The first class constitute in part the capital of the Company. Those who intend to receive its policies and give their notes in advance as a subscription to enable the Company to commence business, are bound as those who give their notes under the

twelfth section of the special charters above referred to for the better security of dealers were bound, and they cannot withdraw their obligation until the whole amount has been paid for premiums on policies received or otherwise, and on the other hand those who as mere dealers receive open policies and give their premium notes therefor are only liable for premiums earned.

And this distinction was further kept up and observed by the Company by providing, as the Vice-President testified, that the givers of the notes called "subscription notes," should be entitled to receive five per cent per annum upon the amount of their notes for the risk which they run in thus advancing their notes to the Company with the liability to pay them in full even though the premiums on the insurances actually effected should not amount to so much. This was also a peculiarity of the subscription notes given under the special charters above referred to and in the cases above cited, this consideration had an important influence in the determination of the liability of the makers. (See particularly opinion of Ch. J. JONES in *Hone et al.* v. *Allen and Paxson*, 1 Sandf., 171.)

The construction of the act of 1849 has quite recently been considered in the Court of Appeals, in *White, Receiver, &c.*, v. *Haight* (16 N. Y. R. [2 E. P. Smith], 310). In that case the Union Mutual Insurance Company had, by its charter, provided for conducting its business upon a system of giving notes which were not to be paid or collected at all events, nor to be negotiated, but which were to operate as guarantees for the payment of only such share of the losses and expenses as the makers might legally be called upon to pay. But that Company had also, as the very foundation upon which it was by the fifth section of the act of 1849, to commence business, a capital made up of notes given in advance under agreements for insurance, and it was held that it is to notes of this latter description the provisions of that section alone are applicable. In that case it was conceded that the note in suit was one of those furnished, at the organization of the Company, for the purpose of complying with the provisions of the fifth section, and, therefore, that as the Company had become insolvent, it was payable to the plaintiff absolutely, while the notes, which, in the conduct of the business of the Company, were received under the stipulation in the charter

which limited the liability of the makers, were deemed to stand upon a different basis, and to be only of the force and obligation which the charter defined.

This view of the act of 1849, seems to us to meet precisely the case before us, and it further disposes of the suggestion of the plaintiff's counsel, that the stipulation that the notes given in advance of premiums upon open policies should in no case be deemed liable for losses beyond the actual earnings on such policies, is illegal and void, because inconsistent with the fifth section of the statute. The Chief Justice says: "The general act of 1849 does not prescribe the manner in which the business of mutual insurance shall be carried on by the companies created under it. The particular mode of operation was left to be provided for by the charter. * * * I entertain no doubt but that the charter of the Company is legal, so far as it provides for premium notes intended as guarantees, to be available only to the extent of the proportion of losses and expenses properly chargeable thereon;" and he holds that if the note be of the latter class, the obligation created thereby was that defined in the charter, and the receiver could hold the maker to no greater liability; while if given as a basis of the organization for risks contracted to be taken, it was to be considered capital, valid, negotiable and collectible, not only to pay losses, but to obtain money for any other lawful purpose.

In this view the statute is consistent with the stipulation in the charter respecting the premium notes, which, in the conduct of the business of the Company, after its organization was completed, and the required subscriptions were secured, they might take from those who received open policies. The object of the Legislature was accomplished when the capital was provided and secured for the protection of those who might sustain losses, &c. The opinion of the Chief Justice seems to us fully to sustain the view already suggested, and to furnish an exposition of the statute, which, irrespective of its force as an authority to us, commands our full concurrence.

The application of these views is obvious; the proof stands uncontradicted that the note in suit was not one of the subscription notes taken under agreements to insure as a basis of the Company's institution. But a premium note received in the

ordinary course of business for premiums upon an open policy, which the charter makes available to the extent of premiums earned, and no further, applying to them the ordinary rule applicable to such notes when given to other companies.

The practice of issuing such open policies to dealers, and taking such notes, is believed to be very extensive with all marine insurance companies—a practice of long standing and of great convenience to those who have occasion to make daily or frequent shipments in small amounts, which are specified and protected by a brief indorsement on the policy.

The circumstance that the policy holder becomes, in the case of mutual insurance, entitled to a dividend of profits, if any accrue beyond the accumulation which is provided for, does not alter his liability on his note. That is also one of the conditions upon which his note is given. He is not entitled to dividends in proportion to the amount of his note, but in proportion to the amount of premiums earned on his policy—*i. e.*, in proportion to the amount which he pays in.

And in this the public have no interest; in respect to this the Legislature have imposed no restriction. The act does not prescribe the manner in which the business shall be conducted. It looks to the security to be afforded by a proper amount of subscription notes to be given before the Company shall commence business at all, and these are held to be payable absolutely. When these notes are procured and for that purpose, it leaves the Company to carry on its business under any other arrangements with its dealers which may be agreed upon.

We have discussed the case with some particularity, not because we believed the principles governing the subject were not settled by the previous adjudications, but because the notes which, in the cases referred to were the subject of contest, were found to be in fact "subscription notes" in the sense above explained, and our discussion may serve to show that these principles, applied conversely to "premium notes," taken in due course of business after the organization of the Company, on open policies, give them validity in favor of the Company, or of its receiver (when the Company becomes insolvent), only to the amount in which premiums have been earned on such policies.

It is not insisted here that the incorporation of The Reliance Mutual Insurance Company was itself defective. It provided for insurance partly with a cash capital and in part upon the mutual plan. It was doubtless believed that the cash capital ($250,000), being liable to policy holders, whether under fire or marine risks, it was a sufficient compliance with the requirement of the fifth section of the statute, to secure agreements for insurance on the mutual plan and take subscription notes to the additional amount of $100,000, together making up the sum of $350,000, which, under that section, would be regarded as capital. Nor does it seem to us material to enter upon the inquiry whether the incorporation of the Company was legal, or whether it was authorized to commence business when $100,000 of notes were so procured. Upon those questions we express no opinion, for if there was in this respect any error or defect, though it might expose the associates to the penalties prescribed in the act, or even though it should leave them without corporate protection, it could not, we think, alter nor affect the liability of dealers *upon* the *notes* subsequently received.

Our conclusions of fact, therefore, are, that the note in suit is not a note given by the defendants or received by The Reliance Mutual Insurance Company, in pursuance of an agreement for insurance, and in advance for premiums on such risks, which, under the provisions of the fifth section of the act of 1849, is to be deemed a part of the capital stock, &c., but is a note received in advance for premiums upon an open policy issued in due course of business by the Company after its organization, and after it had commenced business, and was given in renewal in part of a previous like note for such amount as remained unearned on the policy at the date thereof.

And also that after such renewal the Company failed and became insolvent before any further risk was taken or premium earned on such policy.

And thereupon we are of opinion that the defendant is entitled to judgment, and pursuant to the leave reserved by consent of both parties at the trial, the judgment for the defendant should be here entered.

Judgment for the defendant, with costs.

ALEXANDER GILLESPIE and others, Plaintiffs and Respondents, *v.* DANIEL TORRANCE, Defendant and Appellant.

1. A defendant who by indorsing the note of a vendee becomes bound as indorser to the vendor of goods sold, cannot, when sued upon his indorsement, set up and prove as a defense that the goods sold were warranted, and that the warrantee is broken, and so by showing the damages sustained by the vendee abate from or extinguish the plaintiffs' claim against him as indorser.
2. The cause of action arising upon such breach of warrantee is vested in the vendee; no one can use it as a defense but the vendee unless he has assigned it; it is in the nature of a recoupment or counter-claim; and the indorser cannot use it in his own favor. This was true before the Code; and it can no more be permitted under the provisions of the Code defining a counter-claim. (§ 150.)
3. Whether an indorser for the accommodation of the maker might, in case of the insolvency of the maker, or upon any other equitable grounds be permitted to protect himself in equity by taking the benefit of such a counter-claim. *Quære.*
4. On a sale of a specified number of sticks of oak timber, warranted to be of the first quality, the timber being delivered, accepted and used by the purchaser, it cannot be alleged as a defense to a promissory note given for the price, indorsed by the defendant, that the timber was of an inferior quality, and so the consideration of the note has failed in part. Though the vendor may be liable to the vendee in such case for damages for breach of warranty, there is no failure of the consideration of the note which constitutes a defense to the indorser.

(Before SLOSSON, WOODRUFF and PIERREPONT, J. J.)

Heard, Oct. 13th; decided, Dec. 11th, 1858.

THIS action was tried before Mr. Justice SLOSSON and a jury, May 3d, 1858. The plaintiffs had a verdict, and from the judgment entered thereon the defendant appealed.

The action was brought against the defendant as indorser of a promissory note, dated December 15, 1855, made by J. J. Van Pelt, for $1,808.80, payable five months after date, to the order of the defendant, and by him indorsed to the plaintiffs.

The defense was that the note was given at the city of New York, to the plaintiff, by the maker, Van Pelt, in part payment for a raft of oak and pine timber, then afloat in the North river, on the shore at Hoboken, New Jersey, and was indorsed by the

defendant as surety for Van Pelt, for the purpose of securing payment of the price of the timber to the plaintiffs and for no other consideration.

That at the time of the sale the plaintiffs exhibited to Van Pelt certificates of the inspection and measurement of a quantity of oak and pine timber, which stated the number of sticks inspected and the measurements and descriptions thereof; and stated that there were in the timber so inspected 30,418 feet of first quality oak, 5,618 feet of refuse oak, 1,240 feet of first quality pine, and 85 feet of refuse pine. That the plaintiffs then represented that those certificates were the certificates of the inspection of the raft of timber then offered for sale, and contained a correct statement thereof (with the exception of 21 sticks mentioned in the certificates which were lost.)

That it was, at that time, the usage in the city of New York, among dealers in timber, to purchase and sell timber on the faith of similar inspection certificates and by such usage, the seller of the timber is and was deemed to warrant that the timber sold should correspond with such inspection certificates in respect to the quantity, quality, description and classification of the timber; and that in case of any variance between the said inspection certificates and the timber delivered, the seller should be bound to make good to the purchaser the damage which he might sustain by reason of such variance. That Van Pelt and the plaintiffs were both dealers in timber in said city, and had notice of such usage, and dealt in reference thereto in the sale and purchase of the said raft of timber.

That Van Pelt, relying on the said representations of the plaintiffs, and on the said inspection certificates and upon the said usage, purchased the said raft of timber at certain rates per foot for each description of timber, and for the purpose of ascertaining the quantity and different classes and descriptions of timber contained in the said raft, reference was had to the said inspection certificates and the amount to be paid was computed according to such certificates.

That the terms "first quality oak," and "refuse oak," were and are well known in the timber trade, and denoted different descriptions of timber customarily bought and sold in the New York market, and elsewhere, by those designations.

That the price of the said timber, so computed, amounted to $9,043.98. That Van Pelt has paid on account thereof $7,235.18, leaving unpaid not exceeding $1,808.80, the amount of the note in suit.

That the raft of timber was, after such purchase, delivered to Van Pelt, and he discovered after such delivery, and the defendant alleges the fact to be, that, the inspection certificates did not contain the true measurements of the different descriptions of timber, but was erroneous in the following particulars: That, in lieu of 29,441 feet of first quality oak, there were not in the said raft over 14,720 feet thereof; and in lieu of there being in the said raft 5,523 feet of refuse oak, there were therein about 20,243 feet thereof.

That had the price of said timber been correctly computed, the same would not have amounted to over $4,995.35.

Wherefore the defendant alleged, that the plaintiffs have been already overpaid for the timber so sold and delivered; that there is nothing due to the plaintiffs on the promissory note in suit; and that the plaintiffs have given no consideration therefor.

The action came on for trial on the 3d of May, 1858, before Mr. Justice SLOSSON and a jury.

The defendant put in evidence a bill, in the words and figures following:

"NEW YORK, 12th December, 1855.

"Messrs. J. J. Van Pelt & Dan'l Torrance,

"To Gillespie, Dean & Co.

"For raft of timber at Brown's basin, Hoboken:

29,441 feet	first quality oak,	at 27½c,	....	$8,096 27
5,523 "	second "	13¾c,	....	759 41
1,325 "	pine	12½c,	....	165 62
				$9,021 30
½ inspection at 5 per cent for M.,			....	22 68
[Duplicate.]				$9,053 98

"Payable by J. J. Van Pelt's note, indorsed by Daniel Torrance, at 3, 3½, 4, 4½ and 5 Mos.

"Rec'd payment as annexed,

GILLESPIE, DEAN & Co.
Per N. G. M. CLIBBORN."

The note in suit was admitted by the plaintiffs' counsel to be one of the notes given in payment of the bill aforesaid; and it was also admitted that the other notes given therefor had been duly paid.

Books admitted by the plaintiffs' counsel "to be the books delivered with the said bill of timber, as containing the specification of the contents of the raft," were also put in evidence by the defendant.

They were arranged in columns of figures and at the end of each book was a summary or certificate in the following form:

"WEST TROY, July 31, 1855.

"122	sticks	first quality oak,	7153
26	"	refuse oak,	1820
1	"	first quality pine,	59
149	"		9032 ft.

"Charges $11.28.

"HENRY H. SMITH, Inspector."

The total of first quality oak mentioned in the three was 29,441 feet.

The defendant then proved the mode of marking timber on inspection, and that the timber in question was marked upon that "plan." That the "first installment of this raft, being about one-third of the whole, was brought over to Van Pelt's yard about February, 1856, and the sawing of it was then commenced."

The defendant's counsel then put to the witness the following question: "How did the sticks marked as first quality turn out?"

The question was objected to on the ground that no warranty of quality had been proved; and that no express warranty was alleged in the answer, but only "a warranty by usage."

The defendant's counsel asked leave to amend the answer by averring an express warranty.

The Court denied the motion to amend, on the ground that the papers given in evidence were not any evidence of an express warranty; and also sustained the objection to the question put to the witness. The defendant's counsel excepted to each of these rulings.

The defendant's counsel then inquired of the witness "How did the sticks compare, as to quality of first or second class,

with the specifications in the memorandum books now produced, containing inspector's certificates, &c., as to what were the qualities of the timber?

This question being also objected to, the objection was sustained and the defendant's counsel excepted.

"The defendant's counsel thereupon offered to prove that the timber fell short of first quality of 14,000 feet, and that the difference in value was, at 13¾c a foot, more than the amount of the note.

"Also, to prove that the inspector's books are, by usage, as pleaded in the answer, delivered as evidence of quantity and quality, and that the seller is, by said usage, deemed to warrant that they correspond.

"And that the timber was in a raft, so that the logs could not be turned over without taking the raft to pieces."

On the plaintiffs' objection, the Court excluded the evidence and overruled each offer, and to each ruling the defendant excepted.

The jury, under the direction of the Court, found a verdict for the plaintiffs for the amount of the note, with interest.

From the judgment entered on the verdict, the defendant appealed to the General Term.

Charles A. Rappallo for the defendant (appellant).

I. So far as the defense rests, on the ground of a deficiency in the quantity delivered, it was not necessary to prove any warranty.

II. So far as the defense rests, on the ground of a difference in the quality, the bill and inspection book were evidence of a warranty, and the case should have gone to the jury. (Story on Contracts, § 513; *Hastings* v. *Lovering*, 2 Pick., 214; *Whitney* v. *Sutton*, 10 Wend., 411; *Chapman* v. *Murch*, 19 Johns., 290; *Carley* v. *Wilkins*, 6 Barb., 557.)

The timber was not in this State when purchased.

III. The defendant should have been permitted to prove the usage set forth in the answer.

William Stanley for the plaintiffs (respondents).

I. The answer contains no defense to the cause of action set forth in the complaint.

1. It does not contain a defense on the ground of a failure of consideration.

The raft was the consideration for the note. The only possible pretense for the failure of consideration is through the breach of warranty. (*Gihon* v. *Levy*, 2 Duer, 176.)

2. It does not contain a defense on the ground that there was a breach of the warranty of quality or quantity.

Such a defense would have been in an action against the maker, formerly recoupment, now counter-claim. *It is not a counter-claim when set up by the indorser*, because it is not between parties between whom a several judgment might be had.

It is not a defense in any way for the indorser. A judgment between the indorser and plaintiffs could not be pleaded in an action brought by Van Pelt for breach of warranty. The original contract on the note is not rescinded. The contract of warranty is a new and independent contract made by plaintiffs with Van Pelt, and with which the indorser has nothing to do.

II. The alleged bill put in evidence was not a contract of warranty. It was a mere receipt. (*Seixas* v. *Woods*, 2 Caines R., 48; *Sweet* v. *Colgate*, 20 Johns., 201.)

III. The exception to the motion made to amend the pleadings by inserting an allegation of express warranty in the answer is not well taken.

1. It was a new defense, a change of the original defense in its entire scope and meaning, and took the plaintiffs' counsel by surprise.

2. An amendment is a matter of discretion. The terms on which it will be permitted are discretionary. No exception will lie to a refusal to permit an amendment.

3. The Court held correctly that the bill and books were not evidence of an express warranty, and therefore there was no need of an amendment. And if proved, it would be no defense.

IV. The offer to prove that the seller was by a usage of trade deemed to warrant that the timber corresponded in quantity and quality with the inspector's books was properly excluded.

1. Because it would tend to contradict, vary and annul well settled rules and principles of law, relating to the sale of chattels, to wit:

1st. The rule of *caveat emptor*.

2d. The rule that the warranty of articles not sold by sample must be express, and in the absence of fraud *cannot be implied.* This rule is laid down in *Holden* v. *Dakin*, (4 Johns., 421;) and in *Sweet* v. *Colgate*, (20 Johns., 196.)

Such evidence is inadmissible. (*Thompson* v. *Ashton*, 14 Johns., 316; *Hinton* v. *Locke*, 5 Hill, 437; *Beirne* v. *Dord*, 1 Seld., 102; *Wadsworth* v. *Alcott*, 2 Seld., 65; *Parsons* v. *Miller*, 15 Wend., 561; *Frith* v. *Barker*, 2 Johns., 327.)

BY THE COURT—WOODRUFF, J. There is no dispute upon the question whether the plaintiffs were entitled to recover upon the note in suit, unless the defendant established a defense. If therefore there was no error committed in excluding the evidence offered by the defendant, it was clearly proper to direct the jury to find a verdict for the plaintiffs, for the amount of the note, with interest from the maturity thereof.

The evidence, on the part of the defendant, so far as it was received, established the fact of a sale of the timber mentioned in the answer; the delivery thereof to Van Pelt; that it was paid for by notes made by J. J. Van Pelt, and indorsed by the defendant, of which the note in suit was one, and the others are paid; that memorandum books containing an inspector's certificate of the quantity and quality of the timber, were delivered with the bill of the timber; and that the timber when purchased was bound together in a raft, and lying afloat in the North river, at or near Hoboken, in Brown's basin.

The rulings of the Court, to which exceptions were taken, will be considered quite as favorably for the defendant as he can ask, if we treat them as they would be treated, if the amendment of the answer, which the defendant moved for had been allowed by inserting therein an allegation of an express warranty of the timber. There is some show of reason at least in so considering them, because the Court refused the amendment, on the ground that the evidence, already given by the defendant, was not any evidence of an express warranty. And the evidence, which was thereafter rejected, was offered first, to show that by the usage of the trade on a sale of timber, the inspector's book and certificate are delivered as evidence of the quantity and quality, and the seller is deemed to warrant that the timber sold corresponds

therewith; and second, that the warranty was broken in this; that a portion of the timber which on the sale in question was described in the bill of parcels and in the inspection books and certificate as "first quality oak," was in fact ascertained after the delivery thereof to be second quality or "refuse" oak.

It will, however, be seen that the reasons hereinafter assigned fully sustain the ruling of the Court, in denying the leave to amend, whether the specific reason then given for such denial was sufficient or not.

Two questions, therefore, and we think only two questions, are raised by the exceptions taken at the trial.

First. Can an accommodation indorser who without consideration becomes, by indorsement, a surety for the payment of the price of goods sold to the maker of a note, allege and prove as a defense or by way of counter-claim, that the goods were warranted to the vendee, and that the warranty was broken, and by proving the damages sustained by the vendee, abate from or extinguish the plaintiff's (the vendor's) claim against him upon his indorsement?

Second. Was the evidence which the Court rejected competent to prove, or, if in its nature competent, would it have tended to prove any warranty of the quality of the timber by the plaintiffs on the sale of the timber to Van Pelt, to whom, as alleged in the answer, the sale was made, and for whose accommodation the defendant became indorser, as surety that he should pay the price?

I. The first of these questions is not an open question in this Court. In *La Farge* v. *Halsey et al.*, decided May 2d, 1857, (1 Bosw. R., 171,) this Court, in General Term, held, that in an action against sureties, for the payment, by the tenant, of the rent reserved in a lease, the sureties could not set up, as a counter-claim, damages sustained by the tenant by reason of a breach, by the landlord, of an agreement made by him with such tenant, although the tenant if sued for the rent might have made such counter-claim.

In the present case, if a warranty of the quality of the timber was given to Van Pelt, and it was broken, there is in him a cause of action against the plaintiffs, but even Van Pelt, if he used that claim as a defense to the note would use it upon the principles

governing the doctrine of recoupment. He would not be bound to set it up as a defense to the note; he might bring his own separate action for his damages.

If Van Pelt either brought his action, and now, under the Code, if he set up the claim as a counter-claim to the note, he might recover the whole damages sustained by him.

The defendant here has no control of that cause of action. Van Pelt may enforce it, or may assign it, or may release it. He may not choose to permit the defendant to have the benefit of it. The defendant could not, under any view of the subject, make it available to effect more than an extinguishment of the plaintiff's claim. He is not at liberty to so limit the rights of the vendee and possibly preclude his obtaining full compensation for his damages; for obviously the plaintiffs cannot be required to litigate the matter twice. The establishment of this cause of action by the present defendant, and its allowance in his favor, would not preclude an action by Van Pelt for his damages, and nothing done or proved in this action by this defendant could be permitted to defeat his recovery.

These considerations all show that an indorser in virtue of his relation to the parties as surety for the maker, cannot protect himself by any such counter-claim.

And the definition of a counter-claim in the Code, is further conclusive on the same point. A counter-claim is another cause of action existing *in favor of the defendant*, as well as against the plaintiff. (§ 150.) This is not such a claim.

Whether circumstances might not be suggested which would create such equitable rights in the indorser, in case of the insolvency of the maker, as would entitle him to protection, we do not now inquire, none such appear in this case.

The defendant's answer places his defense upon the ground of a sale and delivery to Van Pelt; his own indorsement, without consi eration received by himself, and as surety for Van Pelt. The defendant is not in a condition to set up a distinct cause of action—a breach of warranty on such a sale, whether the warranty be expressed in words, or otherwise inferrible from all the circumstances—as a counter-claim nor as a defense to the action.

It was ingeniously urged on the argument, that inasmuch as, by reason of the inferiority of some of the timber sold, such por-

tion thereof was reduced to what is called second quality oak or refuse oak, the defendant was at liberty to treat the case as a deficiency in *quantity*, and so he insists that there was a partial failure of the consideration of the sale resulting in an over-payment by the vendee, Van Pelt, which leaves the note now in suit without any subsisting consideration; which view of the subject if correct would show, not a set off or counter-claim, but a defense to the note itself, which will avail as well for the benefit of an accommodation indorser as for the benefit of the maker.

The plausibility which gives color to the argument arises from the casual coincidence that there were two qualities of oak sold, and not from any soundness in the view suggested. Had the sale described the oak as being a given number of sticks or feet of "first quality oak timber," and the whole was delivered and accepted, and it was shown that a part of the timber was of an inferior quality, and yet the whole was retained and used by the purchaser, the defect could never be called a deficiency in *quantity*.

Neither can the defect be so considered with any more accuracy, where, besides such a sale, there was, at the same time and as part of the same transaction, a sale of other oak in terms described as second quality or refuse. The vendee has received the timber he bargained for; the very sticks which were contained in the raft. They may not be so good as was represented, but they are the sticks of timber which in fact he purchased.

Where the property is received and retained a defect in *quality* cannot be regarded as a failure of consideration. The maxim *caveat emptor* applies to the quality of the goods sold unless there is fraud or warranty, and if there be a warranty and it be broken the breach creates a right of action in the vendee, not a defense, (strictly so called,) to the note given for the purchase money. Indeed the goods and the warranty taken together, constitute a full consideration for the note, although the quality be of less value than it is warranted to be.

As, for example, on a sale of a horse which is warranted sound, and which is shown to have some defect not obvious to mere inspection. The consideration of a note given for the purchase money has not failed, the warranty itself (in so far as the defect impaired the value of the horse) makes up the consideration of

the note, and, except upon the principle of recoupment or counter-claim, the vendee is without defense to the note.

It may be, on a sale such as it is claimed was made in the present case, where the property was out of the State, in a condition not readily accessible, and where the sale was made in reliance upon the accuracy of the certificates of inspection, that the purchaser would have a right to refuse to accept the timber if, when delivery was offered, it was found not to correspond with the certificates, but he cannot accept the delivery, retain and use the timber, and if there be no warranty, refuse to pay the consideration. If there be a warranty then the breach of it vests in the vendee himself a right of action, which he may use as a counter-claim if he elect so to do, but which is not vested in the surety and, as already stated, cannot be used by him.

II. The answer to the first question above proposed is sufficient to dispose of the case upon this appeal. The proof offered and rejected was not admissible because if a warranty had been proved, it would not have established nor tended to establish any defense nor any counter-claim in the defendant's favor.

It is therefore wholly unnecessary to consider the other question. No determination of that inquiry could affect the result. Whether the evidence was, in its nature, competent proof of a warranty, or whether, if competent, it would have tended to establish a warranty, the proof could be of no service to the defendant. The warranty would avail him in no manner for his protection.

It would seem by the case that the reason assigned at the time for rejecting a portion of the evidence was, that there was not sufficient evidence of a warranty. The grounds upon which the offers to prove a warranty were rejected are not stated. But these considerations are wholly immaterial. On exception to a ruling, the ruling must be sustained if, in point of law, it was right, whether the appellate tribunal concur in the reasons given therefor or not. Where the true ground of the inadmissibility of material evidence offered is an objection which, had it been suggested, might have been obviated, and its rejection is placed so distinctly upon another and erroneous ground as to mislead the party offering the proof, that consideration might affect the propriety

of granting a new trial, on a motion addressed, as such motions are in some degree, to the discretion of the Court.

But this case is before us on appeal from the judgment and on the exceptions only. If otherwise, no such case is presented as above supposed. The objections to the evidence could not be obviated, and, had everything been proved which the defendant offered to prove, the plaintiff would still, as matter of law, have been entitled to a verdict for the amount of the note and interest.

By this we do not design to intimate an opinion that the ruling was erroneous upon the grounds there stated; it is sufficient to say that we find an established principle which disposes of the case without further discussion. The judgment must be affirmed.

Judgment affirmed with costs.

ADOLPHUS MINCHO, Plaintiff and Apellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Defendants and Respondents.

1. Under the Ordinances of the Corporation of New York, (adopted August 11, 1851, and as amended November 14, 1851,) which provide a less rate of compensation for policemen who are detailed by the Mayor or Chief of Police for special duty, than is provided for those who perform post or patrol duty; a policeman who, during the whole term of his appointment, was detailed by the mayor to serve at the Court of Sessions, is not entitled to be paid as a patrolman, although he did patrol duty a part of every Sunday, and occasionally was called out to serve at fires.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, December 15th; decided, December 31st, 1858.

THIS action came before the Court at General Term on questions of law arising at the trial, and there ordered to be heard at the General Term in the first instance. It was commenced in March, 1856, and was tried before Chief Justice BOSWORTH and a jury, on the 16th of November, 1858.

The complaint alleges that the plaintiff "was a policeman of the City of New York, duly appointed in and for the Sixth

Ward of said city," from on or before the 1st of September, 1851, to the 1st of January, 1853.

That during the whole of this period "he was duly detailed by the Mayor of said city, to attend as such policeman and perform the duties of such policeman at the Court of Sessions in his said ward, and at divers other places in the said city; and that he did during the whole of said period so attend and perform the duties of such detailed policeman."

That "he did during the whole of said period exercise the office and perform the duties of a policeman of said city in his said ward."

That "by an act of the Legislature of the State of New York, entitled 'An Act authorizing the Common Council of the City of New York to regulate the salary of policemen in said city,' passed April 10, 1850, the Common Council of said city were duly empowered and authorized to fix the compensation of policemen."

That "the said Common Council, in due form of law, passed an ordinance on the 18th day of August, 1851, in the words and figures following, to wit:"

"AN ORDINANCE.—The Mayor, Aldermen and Commonalty of the City of New York, in Common Council convened, do ordain as follows:

"§ 1. The salary of Captains of Police is hereby fixed at the sum of eight hundred dollars per annum.

"§ 2. The salary of the Assistant Captains of Police is hereby fixed at the sum of seven hundred dollars per annum.

"§ 3. The compensation of Sergeants of Police, and Policemen performing post or patrol duty in their respective wards, shall be, for each and every day's service, at the rate of six hundred dollars per annum.

"§ 4. The salary of policemen detailed by the Mayor or Chief of Police for the performance of any special duty is hereby fixed at the sum of five hundred dollars per annum.

"§ 5. This ordinance shall take effect on the first day of September next."

The complaint further alleges, that the said Common Council, on the 14th day of November, 1851, in due form of law, passed another ordinance, in the words and figures following, to wit:

"An ordinance amending an ordinance fixing the compensation of Captains of Police and Policemen, approved August 18th, 1851.

"The Mayor, Aldermen and Commonalty of the city of New York in Common Council convened, do ordain as follows:

"§ 1. The third section of the ordinance prescribing the compensation of Captains and Assistant Captains of Police, Sergeants of Police and Policemen, approved August 18th, 1851, shall be amended by striking out the words 'for each and every day's service at the rate of,' so that said section when thus amended shall read as follows:

"§ 2. The compensation of Sergeants of Police and Policemen performing duty in their respective wards, shall be six hundred dollars per annum.

"§ 3. This ordinance shall take effect immediately."

And the plaintiff further says, that the said Common Council on the 15th day of September, 1853, in due form of law, enacted as follows:

"*Resolved*, That the pay of the detailed policemen be and is hereby fixed at the same rate as all other policemen, viz., six hundred dollars per annum, to take effect from the first day of January, 1853."

"And the plaintiff further says, that during the aforesaid period, to wit, from on or before the first day of September, 1851, until on or before the first day of January, 1853, he received for his said services as such detailed policeman, and as a policeman in his said ward, only at and after the rate of five hundred dollars per annum; whereas, the amount actually due to the plaintiff for his aforesaid services, under the ordinances aforesaid, above what he so received, is one hundred and thirty-three dollars and thirty-three cents, besides interest thereon; which amount has been duly demanded from the aforesaid defendants, and the payment thereof unjustly refused.

"Wherefore the plaintiff demands judgment against the said defendants for the said sum of one hundred and thirty-three dollars and thirty-three cents, with interest from the first day of January, 1853."

The defendants, in their answer to the complaint,

I. "Deny each and every of the allegations of said complaint, except such as, and so far as the same are hereinafter admitted to be true."

II. "They admit that the said plaintiff was, from on or about the first day of September, 1851, to on or about the first day of January, 1853, a policeman of the city of New York, duly appointed in and for the Sixth Ward in said city, and that during said period, he was detailed by the Mayor of said city, to attend as such at the Court of Sessions in the Sixth Ward in the said city, and that he was, during said period, entitled to the compensation or salary, provided by the ordinance of the 18th of August, 1851, in said complaint set forth, to be paid to policemen detailed by the Mayor, or Chief of Police, for the performance of any special duty."

III. "They admit the passage of the act of the Legislature of the State of New York, and the ordinances and resolution of the Common Council of the city of New York, in the complaint set forth."

IV. "For a further answer to this action, they say, that they have paid the plaintiff in full for the services hereinbefore admitted to have been rendered them by him, and for every other service ever rendered them by the plaintiff," &c., &c.

No questions arose upon, or are affected by any portions of the answer not above set forth.

The entire testimony given, and all the proceedings had at the trial, are as follows, viz:

Adolphus Mincho, the plaintiff, being duly sworn as a witness on his own behalf, testified as follows: "I was a policeman of the city of New York of the Sixth Ward from the first day of September, 1851, to January first, 1853, during all which time I performed the duty of a policeman in said ward; during all that time I was detailed and performed the duties of a detailed policeman at the Court of Sessions in said ward; I also did patrol duty in said ward for a part of every Sunday during that period, and made arrests in said ward and out of said ward, and I was sometimes called out when there was a fire; I was paid during that period at the rate of only five hundred dollars per annum.

Being *cross-examined*, the witness testified: I was detailed a year or two or more before the first day of September, 1851, I

was not a member of any patrol or post squad; I appeared at the station house at muster call on Sundays in the morning; I did patrol duty during said period parts of every Sunday, also at new years' and at riots; I cannot tell how often I was called out at riots or fires; on Sunday I was not required at the Court of Sessions; I was paid, and signed a pay roll during that time semi-monthly; I never made a demand at the time of any payment to me, or at any other time for more salary than at the rate of five hundred dollars a year; I cannot say how often, nor on what particular nights I did such night duty."

On his *re-direct examination*, the witness further states:

"During that time, I did some night duty; I was always called out at riots, fires and holidays.

Spencer H. Stafford, being sworn as a witness on the part of the plaintiff, testified, that the plaintiff's claim, from September 1, 1851 to January 1, 1853, is $133.33, the interest thereon from January 1, 1853, $54.83, amounting to $188.16.

The plaintiff here rested his case.

The defendants by their counsel moved to dismiss the complaint on the following ground. *First*—"That the plaintiff had not shown facts sufficient to constitute a cause of action against the defendants, whereupon the Court granted said motion to dismiss the complaint, to which decision the said plaintiff by his counsel then and there excepted. It was thereupon ordered by the Court that the questions of law arising on the said trial be heard in the first instance at General Term, and that the entry of judgment be suspended until the decision of the General Term."

Henry L. Clinton for the plaintiff.

Richard Busteed for the defendants.

BY THE COURT—HOFFMAN, J. The plaintiff alleges that he was, from the 1st September, 1851, to the 1st of January, 1853, a policeman of the city of New York, duly appointed in and for the Sixth Ward in said city, and entitled to the exercise of such office of policeman. During the whole of such period he was

detailed by the Mayor to attend as such policeman, and perform the duties of such policeman, at the Court of Sessions in his said ward, and at divers other places in the said city; and that he did so attend and perform the duties of such detailed policeman.

Under powers conferred by the act of the Legislature of April 10, 1850, the Common Council, by an ordinance of the 18th of August, 1851, declared, in the third section, that the compensation of sergeants of police, and policemen performing post or patrol duty in their respective wards, shall be, for each and every day's service, at the rate of $600 per annum.

And by the 4th section, that the salary of policemen detailed by the Mayor or Chief of Police, for the performance of any special duty, is fixed at the sum of $500 per annum.

Under this ordinance the plaintiff received his appointment.

On the 14th of November, 1851, the Common Council amended the third section so that, as thus amended, it read as follows: "The compensation of sergeants of police and policemen performing duty in their respective wards, shall be six hundred dollars per annum." The fourth section was left unchanged.

On the 15th September, 1853, an ordinance was passed, that the pay of the detailed policemen be fixed at the same rate as all other policemen, viz.: $600 per annum, to take effect from the 1st of January, 1853.

When this ordinance went into effect, the period of service of the plaintiff had ceased.

The plaintiff, on his examination as a witness, states that he did duty as a detailed policeman, and also did patrol duty part of every Sunday in his ward, and was sometimes called out when there was a fire; that he was not a member of any patrol or post squad.

The plaintiff claims the difference between $500 and $600, for the whole period of his service, being, with interest, $188.16.

Mr. Justice BOSWORTH granted a motion to dismiss the complaint. An exception was taken; the exceptions to be heard in the first instance at General Term, and judgment suspended.

It is rare that so plain a case is presented to the Court. The Common Council discriminate between classes of policemen, and appoint different salaries for each class. This discrimination lasts while the plaintiff serves; and he was appointed in the class

which received $500 salary. If he did other duty he volunteered it, without a shadow of contract, express or legally to be implied, that he should be paid; without a pretense even that the Common Council knew of the services, much less directly, or through any authorized agent, engaged him to render them.

The order dismissing the complaint should be affirmed, and judgment ordered for the defendants, dismissing such complaint, with costs.[1]

Judgment accordingly.

JAMES McNULTY *v.* THE MAYOR, &c.

THIS action involved the same question, and was decided in the same manner, at the same time, and by the same justices, as the foregoing case of *Mincho* v. *The Mayor, &c.*

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[1] The *third* section of the ordinance of the 18th of August, 1851, fixed the compensation of policemen "performing post or patrol duty," and the *fourth* section that of "detailed" policemen. The compensation prescribed for "detailed" policemen was $500 per annum; that prescribed for policemen "performing post or patrol duty" was not $600 per annum at all events, but was at that rate "for each and every day's service."

The ordinance of the 14th of November, 1851, by its terms, professed to operate upon the third section, and on that only. It amended that section so that by it, as thus amended, the compensation prescribed for policemen performing duty in their respective wards should be $600 per annum, generally and absolutely, and not at that rate "for each and every day's service." The ordinance of the 14th of November, 1851, does not, in terms or by any just construction, affect the fourth section of the ordinance of the 18th of August, 1851.

The very terms of the amending ordinance show that the whole object and purpose of amending was to eliminate from the third section the words "for each and every day's service at the rate of."

That such was the whole purpose of the amendment, and that it was so understood by the policemen and the defendants is shown, not only by the fact that the detailed policemen were subsequently paid and received $500 per annum, as being the whole compensation to which they were entitled, but also by the ordinance of the 15th of September, 1853, by which "the pay of

DUDLEY SMITH *v.* SYMMES GARDNER, Survivor, &c.

1. The makers of a promissory note, which, in terms, is payable to their own order, and is by them indorsed, thereby contract with whomsoever may be the legal indorsee when it becomes payable, to pay it to him.
2. Such a note, though made in and by a resident of Massachusetts, and delivered by the maker to a resident of the same State, can be collected of the maker by an indorsee of it residing in New Hampshire, notwithstanding the subsequent discharge of the maker by the insolvent laws of Massachusetts; such indorsee having taken it for value before its maturity, and not having been a party to such insolvent proceedings.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, December 4th; decided, December 31st, 1858.

THIS is a motion by the plaintiff for judgment on a verdict in his favor taken subject to the opinion of the Court. The case presenting only questions of law, they were ordered, at the trial, to be heard in the first instance at the General Term. The action was tried before Mr. Justice SLOSSON and a jury, on the 23d of April, 1857. It was brought by the plaintiff (Dudley Smith), a resident of the State of New Hampshire, to recover of the defendant, Symmes Gardner, survivor, &c., the amount of a promissory

the detailed policemen" was "fixed at the same rate as all other policemen, viz.: $600 per annum, to take effect from the first day of January, 1853."

The idea that a policeman, though a "detailed policeman" was entitled to $600 per annum, provided he performed such duty in his own ward; and was entitled to but $500 per annum if he performed such duty in another ward, can find no support from the ordinance of August 18, 1851, as amended by that of the 14th of November, 1851.

There is nothing in the evidence given at the trial to justify the presumption or inference that any of the services which the plaintiff performed while a policeman, and as a policeman were services which it was not his duty as a "detailed policeman" to perform. They seem to have been performed as services which, according to the regulations of the police department, a "detailed policeman" was expected and required to render, as a matter of course. The evidence given is in perfect harmony with this view of his duties. In this view, the plaintiff has been paid the full compensation to which he was entitled. The ordinance of the 15th of September, 1853, cannot aid his claim to extra compensation, as he ceased to be a policeman before the time arrived from which that ordinance was to take effect.—*Rep.*

note for $1,466.20, dated 13th September, 1851, made by the firm of Gardner & Bartlett, (of whom defendant is the survivor,) payable six months after date, to their own order, and by them indorsed.

The defendant claims the benefit of a discharge alleged to have been obtained by him under the insolvent laws of Massachusetts, on the 19th May, 1853, whereby he insists he was discharged from liability on the note.

The material facts, as proved at the trial, are as follows:

On or about 13th of September, 1851, the firm of Smith & Lougee, (composed of Frederick Smith, Jr., and Charles F. Lougee,) at Boston, in Massachusetts, where they were doing business, sold to Gardner & Bartlett, of the same place, merchandise, and received therefor the note in suit.

Smith & Lougee sold said note before its maturity, to Frederick Smith, Sr., (an uncle of Frederick Smith, Jr.,) who received it on account of a large debt due him by Smith & Lougee.

On or about 15th of October, 1851, the plaintiff (Dudley Smith), who, for twenty years, has resided, and still resides, in New Hampshire, at Gilford, in that State, purchased this note from Frederick Smith, Sr., and gave him therefor a note of Frederick Smith, Sr., for $814.46, dated 18th December, 1848, payable on demand, with interest, and a receipt to account to him for the balance of this note when collected, after deducting charges and expenses of collection; Frederick Smith, at the same time, guaranteeing the note.

The record of the proceedings in insolvency, the admission of which was objected to, as not being proved by sufficient or competent testimony, purported to show, that the original warrant in the insolvency proceedings of Gardner and Bartlett was issued on the 5th of November, 1852, and that such proceedings were thereupon had; that on the 19th of May, 1853, the commissioner granted to Gardner and Bartlett a discharge, which is set forth in the case.

The discharge was granted under a statute of the State of Massachusetts, passed on the 23d of April, 1838, and the statutes or "acts in addition thereto," and in terms declares "that by force of the acts aforesaid, the said Symmes Gardner is absolutely and

wholly discharged from all his joint and separate debts which have been or shall be proved against his joint or separate estate assigned as aforesaid, and from all his joint and separate debts which are provable under the said acts, and which are founded on any contract made by him within this Commonwealth or to be performed within the same, and made since the passing of the first named act aforesaid, and from all debts which are provable as aforesaid, and which are founded on any contract made by him since the passing of said first named act, and due to any persons who were resident within this Commonwealth on the 6th day of November last, being the day of the first publication of the notice of the warrant issued for the seizure of the estate of the said Symmes Gardner, and from all demands against him for or on account of any goods or chattels wrongfully obtained, taken or withheld by him according to the form of the act aforesaid."

The exceptions taken to the sufficiency and competency of the evidence given to prove the proceedings in insolvency, are not stated, as the Court was of opinion that the discharge, though proved by unexceptionable evidence, was not a bar to the present action.

The Judge directed a verdict in favor of the plaintiff for $1,915.10, subject to the opinion of the Court, and directed the questions of law arising in the case, to be first heard at the General Term. A verdict was given accordingly, and the plaintiff now moves for judgment on the verdict.

B. W. Bonney & Alfred Roe, for the plaintiff.

Even if it be admitted that the discharge of the defendant was duly granted and duly proved at the trial, the plaintiff is still entitled to recover: He was *never a resident of the State of Massachusetts;* and, being a non-resident creditor, his claim is not affected by this discharge. (Laws of Mass., 1838, ch. 163, § 7; *Baker* v. *Wheaton*, 5 Mass. R., 509; *Watson* v. *Bourne*, 10 id., 337; *Braynard* v. *Marshall*, 8 Pick. R., 194; *Betts* v. *Bagley*, 12, id., 572; *Agnew* v. *Platt*, 15 id., 417; *Savoye* v. *Marsh*, 10 Met. R., 594; *Fiske* v. *Foster*, 10 id., 597; *Ilsley* v. *Merriam*, 7 Cush. R., 242; *Towne* v. *Smith*, 1 Woodb. and Minot, 115; *Donnelly* v. *Corbett*, 3 Seld., 500; *Gardner* v. *Oliver Lee's Bank*,

11 Barb., 558.) The plaintiff is, therefore, entitled to judgment for the amount due on the note, as stated in the case, with interest from the time of the trial, and costs.

John E. Parsons for the defendant.

1. All contracts not expressly providing that they are to be performed elsewhere, are deemed to be contracts of the place where they are made.

This note, for example, made in Boston, and payable generally, was payable in Boston.

Its obligation, effect, and construction, therefore, are governed, and are to be determined by the Laws of the State of Massachusetts, where it was made and was to be paid. (Story's Conf. of Laws, §§ 242, 261, 263, 266, 278*a*, 280, 314; 2 Kent's Com., 459; Note to *Andrews* v. *Herriot*, 4 Cowen, 511, stating all the authorities. *Vide* all the cases cited below.)

2. It follows as a part of the same rule, that a discharge which is valid by the laws of the place where the note is made, and is to be paid, is valid everywhere. (Story's Conf. of Laws, §§ 331, 333, 335, 340, 346; 2 Kent's Com., 459; *Potter* v. *Brown*, 5 East. R., 124; *Blanchard* v. *Russell*, 13 Mass. R., 4.)

3. That this is so where the parties to the contract are all subject to the jurisdiction of the same State, and where the law is made by an authority common to the debtor and creditor, is abundantly demonstrated by the following authorities. (*Smith* v. *Smith*, 2 Johns. R., 240; *Mather* v. *Bush*, 16 Johns., 233; *Van Hook* v. *Whitlock*, 26 Wend., 53; *Baker* v. *Wheaton*, 5 Mass., 509.)

4. That the residence of the parties to the contract does not vary the effect of the discharge; but that a discharge in proceedings conformed to the laws of the State where the contract was made, and is to be performed, (the contract having been originally made between citizens of that State,) absolutely discharges all liability upon the contract, is now established to be the true rule in respect to the effect of a discharge in insolvency. Parties contract with reference to the law of the place where the contract is made; the creditor looks to the remedies which that law provides, and every assignee of a contract takes with notice of every defense to it, given as matter of course by the laws of the

place where the contract was made. The true rule is that the obligation of a contract may be discharged by the same law which gave it force. (Story's Conf. of Laws, § 340; 2 Kent's Com.; *Potter* v. *Brown*, 5 East. R. 123, 130; *Hicks* v. *Brown*, 12 Johns., 142; *Sherrill* v. *Hopkins*, 1 Cowen, 103, 107; *Blanchard* v. *Russell*, 13 Mass. R., 1; Reviewing all the earlier cases; *Ory* v. *Winter*, 16 Martin's (Lou.) R., 277; *Stevens* v. *Morris*, 10 N. H., 466; *Hall* v. *Boardman*, 14 N. H., 38; *Brigham* v. *Henderson*, 1 Cushing, 430.) He also cited, and commented on, (*McMillan* v. *McNeill*, 4 Wheat., 209; *Sturges* v. *Crowningshield*, id., 122; *Cook* v. *Moffat*, 5 How., 295; *Ogden* v. *Saunders*, 12 Wheat., 213; *Donnelly* v. *Corbett*, 3 Seld., 500,) and insisted that the discharge terminated all liability of the defendant, as maker of the note in suit.

BY THE COURT—PIERREPONT, J. The questions for consideration are: *First*, whether the defendant has shown a discharge under the insolvent laws of Massachusetts, by competent evidence?

And *second*, whether such discharge, if proved, is a bar to this action?

We have very grave doubts whether any discharge has been shown by legal proofs. But conceding the discharge to have been established, as claimed by the defendant, we think such discharge no bar to this action. The note was negotiable; and payable at no particular place. It was drawn to the makers' order; by them indorsed in blank and put into the market, in payment for goods. It passed to the plaintiff, (a resident of New Hampshire,) before due, in the regular course of business, and for value. It was not a contract to be performed at any particular place. It was a contract *to pay the holder*, wherever such holder might reside, at its maturity. If the maker, after default in payment, had been found in New Hampshire, he could have been sued there. He was found in New York and is sued here. (*Braynard* v. *Marshall*, 8 Pick., 194; *Savage* v. *Marsh*, 10 Met., 594.)

He pleads a discharge from his debts under the insolvent laws of Massachusetts, to which discharge, or to any proceedings therewith connected, the plaintiff has never been a party. On

the principle of comity between the States, our courts are asked to recognize this discharge as a good plea in bar to the action. I think it quite clear, from several decided cases, that if this suit were before the courts of Massachusetts, this discharge would not avail the defendant. (*Dinsmore* v. *Bradley*, 5 Gray, 487; *Houghton* v. *Maynard*, 5 id., 552; *Savage* v. *Marsh*, 10 Met., 594; *Braynard* v. *Marshall*, 8 Pick., 194.)

It would then be something more than comity, for our courts to give effect to a Massachusetts discharge, which the courts of that State would not.

Since the case of *Donnelly* v. *Corbett*, in which Judge GARDINER delivered the opinion of the Court of Appeals, (3 Seld., 500,) the question as to the effect of a discharge under an insolvent law of a sister State, has been considered *settled* in New York. Corbett, a resident of South Carolina, purchased goods of Donnelly, a merchant of New York, and gave his note for the price, payable eight months after date, at the Bank of South Carolina, in Charleston. The note was dishonored, and Donnelly recovered judgment in the State of South Carolina; a *ca. sa.* was issued upon the judgment, and Corbett was imprisoned. Subsequently he obtained a discharge from imprisonment, *and from his debts*, under the insolvent laws of South Carolina, which were passed in 1759, and perpetuated in 1783. Some two years after the discharge, Donnelly commenced suit upon the judgment, by attachment, issued out of the Supreme Court of this State. Corbett pleaded his discharge in bar. The Court *held* that the discharge was no bar to this action, although the place of the performance of the contract was in South Carolina, and although the law of that State, under which the discharge was granted, had been in force more than fifty years before the debt was contracted.

Judgment must be entered for the plaintiff, with costs.

Judgment accordingly.[1]

[1] *See Robinson's Practice*, TITLE "Effect of discharge under Insolvent or Bankrupt Law," vol. 1, p. 89.

HEROY, STRUTHERS & Co., Plaintiffs and Respondents, *v.* VAN PELT & SMITH, Defendants and Appellants.

1. Where a firm has bought goods and is subsequently dissolved, and a new firm is formed composed of one of the former firm and of a third person, but under the same firm name; and subsequently a note in the firm's name is given by the partner who was a member of both firms, to a vendor of goods to the old firm, and such note is not paid when due; the vendor may recover, in an action for goods sold and delivered, of the persons to whom they were sold; if it appear that when he took such note he had no knowledge or notice that it was not the note of the firm composed of the individuals to whom the goods were sold.
2. "Was this note the note of the old firm or the new firm?" is an improper question to be put to a witness on the trial of an action for the goods so sold.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)
Heard, December 15, 1858; decided, January 15, 1859.

THIS is an appeal by the defendant, *Smith*, from an order denying a motion made by him on a case (containing exceptions) for a new trial. The action was tried before Mr. Justice PIERREPONT and a jury, on the 22d of June, 1858.

The action was brought by James H. Heroy, Joseph Struthers and David J. Mariner, as partners, under the firm name of Heroy, Struthers & Co., against *Henry Van Pelt* and *Nicholas E. Smith*, as partners, under the firm name of "*Van Pelt* & Smith," to recover for goods (consisting of glass) sold and delivered by the plaintiffs to the defendants, between the 16th and 31st of July, 1857, amounting to $635.

Nicholas E. Smith alone answered the complaint, and set up as a defense that he and Van Pelt dissolved on the 15th of September, 1857; and that immediately thereafter, and on or about the 15th of September, 1857, Van Pelt formed a partnership with one *James B. Smith*, and continued business under the firm name of "Van Pelt & Smith;" and that the plaintiffs, on the 9th of October, 1857, took a note of the new firm, dated the 25th of September, 1857, for the amount of their claim, at four months, "in full payment and satisfaction of the claim of the plaintiffs, upon the original firm of Van Pelt & Smith."

At the trial, Joseph Struthers, Nicholas E. Smith, Heroy, Van Pelt, and James H. Heroy, were examined as witnesses.

It was proved that the plaintiffs took a note, on the 9th of October, 1857, dated the 25th of September, 1857, signed "Van Pelt & Smith," for $635, at four months, and gave a receipt, reading thus:

"NEW YORK, Oct. 9, 1857.

"Received from Van Pelt & Smith their note, dated Sept. 25, '57, four months, for six hundred and thirty-five $\frac{00}{100}$ dollars, in full for bill of glass to date.

"$635.00. HEROY, STRUTHERS & Co."

The testimony of Struthers & Heroy tended to show that neither of them knew, or had reason to suspect, when the note was taken, that N. E. Smith had ceased to be one of the firm of "Van Pelt & Smith," or that *James B. Smith*, had become a member of it. The testimony of N. E. Smith and of Van Pelt, on the other hand, tended to show that Heroy and Struthers both knew of the change in the firm of Van Pelt & Smith, and took the note with full knowledge of it.

Henry Van Pelt, who was offered as a witness for the defendant, after *testifying* to the circumstances under which, as he represented, the note of the 25th of September, 1857, was given; the time when it was given; as to the dissolution of the firm of Van Pelt & Smith, and as to the formation of the new firm of that name; and as to the plaintiff's knowledge of those facts when they took the note, was asked this question:

Q. "Was this note the note of the old firm, or of the new firm?"

The plaintiffs objected to the question, the objection was sustained and the defendant excepted.

When the evidence was closed, the defendant requested the Court to charge the jury, that the defendant was entitled to a verdict. The Court refused to so charge, and the defendant excepted.

The Court "charged the jury that if they believed from the evidence that neither of the plaintiffs knew or had notice that

the note referred to was the note of the new firm when they took it, that then the plaintiffs were entitled to recover."

No exception was taken to the charge.

The jury rendered a verdict for the plaintiffs for the amount claimed. The defendant made a case containing the evidence and the foregoing exceptions, and moved thereon at Special Term for a new trial, which motion was denied, and from the order denying it, the defendant Smith, appealed to the General Term.

The plaintiff's in their complaint, alleged that such note had been given and taken; that it was given and taken as being the note of the old firm, and therein offered to surrender it at the trial, and on the trial the note was produced at the request of the defendant.

William Stanley, for the appellant, (the defendant Smith.)

W. W. Niles, for the respondents, (the plaintiffs.)

MONCRIEF, J. It is insisted that the Judge erred, at the trial, in refusing to allow the question:

"Was this note the note of the old firm or of the new firm?"

Some testimony had been given tending to show the circumstances under which the note was taken by the plaintiffs; whether it was the note of the old firm or of the new firm, and perhaps enough to show by which of the two firms it was in fact made. At all events, sufficient evidence had been adduced to make it proper to submit this question to the jury. The witness was asked, in effect, to state a fact which it was the province of the jury to determine, if the evidence can be regarded as conflicting. If it cannot be regarded as conflicting, then he was asked to state a conclusion of law.

The ruling of the Court was correct.

The fact that the note was made by the new firm was assumed by the Court in the charge to the jury.

The defendant also urged that the Court improperly refused to charge the jury, the evidence being closed, "that the defendant was entitled to a verdict."

The issues made by the pleadings, presented the questions, whether the note delivered to the plaintiffs was known by them to be the note of the new firm, and whether it was taken by them in payment and satisfaction of the claim in suit. Much testimony had been introduced in reference to these questions, and the jury of right alone could determine them. The case was not of a character to be withdrawn from the consideration of the jury.

The Court properly submitted the whole case and its issues to the jury. The charge was "that if they believed, from the evidence, that neither of the plaintiffs knew or had notice that the note referred to was the note of the new firm when they took it, that then the plaintiffs were entitled to a verdict."

No exceptions were taken to the charge of the Judge, nor was any request made to submit any matter or proposition to the jury. The defendant therefore cannot complain of the charge.

The jury found a verdict for the plaintiffs.

Upon a careful review of the whole case it cannot be said that the verdict is not well sustained by the evidence. The finding, clearly, is not against the weight of evidence.

The order denying a new trial should be affirmed, with costs.

Hoffman, J. There was no exception to the charge. The acceptance of a note of the new firm for a debt of the old firm may, under certain circumstances, operate as a discharge; but if the creditor took a note of new parties dealing under the same firm name, from one of them who was his original debtor, and with the concurrence of the other member of the old firm no discharge of the obligation of the latter would be produced. The whole case turns upon the question whether the plaintiffs did not expect to get, and suppose they had got, the note of the old firm; and whether the present defendant, Smith, did not sanction, by his acts, this supposition. This question was fairly put to the jury, and they have answered it in the plaintiffs' favor.

The question whether the note given, was the note of the old or of the new firm, was a complex question of fact and law, not to be put to a witness.

The order denying a new trial must be affirmed, with costs.

PIERREPONT, J., concurred in the opinion that the order should be affirmed.

Order affirmed.

LOWELL HOLBROOK *v.* WM. S. WILSON and FRANCIS BROWN.

1. Where, in an action by an indorsee against the makers of a note, the defense is that it was made and delivered to an Insurance Company, at its request, and without consideration, solely by reason of false representations made by the *officers* of the Company, that the Company fraudulently misappropriated it, and that the plaintiff took it with knowledge of such facts; and it appears at the trial that the defendants made the note at the solicitation of Rich & Knowlton, who had subscribed $2,500 to "a subscription of $400,000 in premium notes (to be given to such Company) to be written against," and "to be binding when $300,000 was subscribed"; to enable Rich & Knowlton to give such note to said Company in lieu of their own note for that sum, in payment of a like amount of their said subscription, and that Rich and Knowlton, on soliciting and obtaining such note, stated to the defendants the terms of the $400,000 subscription, and that in procuring such note they were acting in their own behalf; evidence of the representations made by Rich and Knowlton, to the defendants, as to the condition of the Company, are inadmissible.
2. To make them admissible, under such pleadings, it is necessary to show that Rich & Knowlton were then acting as agents of, or on behalf of said Company, or that the latter took the note with notice of such representations.
3. In such an action, the defendants must, at least, show that the condition, on which the subscriptions to the $400,000 subscription were to be binding, had not been complied with by a subscription of $300,000, assuming that such a defense would be equally open to them as to Rich & Knowlton, on a note given by the latter, in pursuance of their subscription.
4. If a note be voluntarily given in payment of such a subscription before $300,000 is subscribed, and with knowledge of that fact; it cannot be set up as a defense to a suit on the note, that $300,000 was not in fact subscribed, when such note was made and delivered to the Company.
5. The fact, that such Insurance Company, a few days after the defendants' note was taken by it, sent to them a written receipt, (in terms like those sent to the actual subscribers,) which receipt stated that such Company had received from the defendants, the note in question "being their subscription to the Atlas Mutual Insurance Company, to be held and used by the Company

for the purpose of paying the losses of the Company, or to be used in raising money to be applied to the payment of said losses. Five per cent to be paid by the Company on the payment of said note, according to the terms of the charter," is of itself no defense to an action by the Company on such note; or by one to whom it has been transferred by order of the Company as security for the payment of money loaned on its credit to the Company.

6. When there is no conflict of evidence, the question, whether the facts which it tends to establish constitute a defense, it is for the Court to determine and not the jury.

7. The fact, that $37,000 in amount, of the $300,000 subscription, was subscribed by other insurance companies, does not tend to show a non-compliance with the condition on which the subscriptions to the $400,000 subscription were to be binding, it not appearing what the names of those companies are, and that they had not legal capacity to so subscribe.

8. The refusal of the judge, at the trial, to adjourn the cause to a subsequent day, to enable either party to obtain further testimony, cannot be made the subject of an exception.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, November 10, 1858; decided, January 22, 1859.

THIS case comes before the Court, on questions of law arising at the trial, and there directed to be heard in the first instance at the General Term. The action was tried on the 8th of April, 1858, before Mr. Justice BOSWORTH and a jury, when a verdict was ordered in favor of the plaintiffs for the amount claimed. It is brought by the plaintiff as indorsee of a note, of which the defendants are the makers.

The *complaint* (verified November 26th, 1856,) states that the defendants, as partners, composing the firm of Wilson & Brown, on or about the 8th of November, 1855, made their note of that date for $500, payable twelve months from its date, to their own order, for value received, and indorsed it in blank, and delivered it to the Atlas Mutual Insurance Company; that afterwards and before its maturity, the plaintiff became the lawful holder of it for value, and still is; that it is past due, and wholly unpaid, and prays judgment for $500, with interest from November 11th, 1855.

The answer (verified December 26th, 1856,) *first*, denies that on or about the 8th of November, 1856, the defendants made or indorsed the note, or delivered it to said Insurance Company, or that it was transferred to the plaintiff for value before its maturity, or any time, or that he became or is the lawful holder of it.

Second. It alleges as a separate and distinct defense, that on or about the 8th of January, 1856, the defendants executed such a note as that described in the complaint; that this was done at the request and solicitation of said Company, and the note, at the like request, was dated the 8th of November, 1855. That it was so made, and indorsed and delivered to said Company, "upon an agreement with said Company, that said note should be held by it, and appropriated in payment of premiums upon insurance, which said Company agreed to make for these defendants, and for which policies were to be issued by said Company, and not be used or applied otherwise: that at the time said note was so made and delivered, the officers of the said Company stated and represented to the defendants that the said Company was in good condition and standing, and was perfectly solvent, and would be able to issue all the policies to which the defendants would be entitled by the payment of premiums to the amount of the said note, and to meet and pay all the liabilities they might thereby incur; that it was entirely upon the faith of, and in full belief and confidence in the said representations, that these defendants made and delivered the said note, and they received no consideration whatever for the same."

That the Company was then utterly insolvent, without means to meet any of its engagements; that this was known to its officers when said representations were made; that said representations were false and fraudulent, and that solely by reason thereof the defendants were induced to deliver the note to said Company. That said Company, soon thereafter, and without having issued any policies to these defendants, suspended business, was declared insolvent, and a receiver of all its effects was appointed. That if the note was ever transferred to the plaintiff, he took it with notice of all these facts.

Third. It alleges as a further and distinct defense, that "at or about the time of the insolvency of the said Company, certain persons who were or had been trustees and officers of the said Company, in violation of law, and in fraud of the rights of the receiver of said Company, and with knowledge of the insolvency of said Company, took possession of certain notes given in advance payment of premiums to said Company, and among others the said note of these defendants was transferred by said persons to

the plaintiff. That the possession of said trustees and transfer to said plaintiff, was fraudulent and without consideration; and the defendants aver that the said note is held, and this action prosecuted by the plaintiff, solely for the benefit and advantage of the said trustees."

At the trial, the plaintiff read the note in evidence and rested.

William S. Wilson, one of the defendants, testified, in substance, that the note, in suit, was signed by his partner Brown, on the 8th of January, 1856, and was delivered to Mr. *Hinckley*, an officer of the Company, at its office. "When we first saw it it was all filled up, it was handed to me by Mr. *Rich*," of the firm of *Rich & Knowlton*, "a firm with which we had business connections."

"Q. State whether any statements were made to you by any agent or officer of the Company as to the reason for ante-dating the note.

A. "When I handed the note in, I said to Mr. Hinckley I thought the notes were made too short; Mr. Rich had stated that it was ante-dated to correspond with other subscriptions; Mr. Hinckley, in answer to my remark to him, said it was made short to facilitate the operations of the Company; the note was given to be used up in premiums and to be used by the Company, and in consideration of five per cent to be allowed to us as to other parties making subscriptions; there was no other consideration for it; no representations were made to us by any officer of the Company."

He further testified, that a "few days after we gave the note" a paper was sent to them from the office of said Insurance Company, which reads thus, viz.:

"Office of the Atlas Mutual Insurance Company,
New York, Dec. , 1855.

Received of Messrs. Wilson & Brown their note for five hundred dollars at 12 months, from Nov. 8, 1855, in favor of themselves being their subscription to the Atlas Mutual Insurance Company, to be held and used by the Company for the purpose of paying the losses of the Company, or to be used in raising money to be applied to the payment of said losses. Five pe

cent to be paid by the Company on the payment of said note, according to the terms of the charter.

GEO. H TRACY, Secretary."

That not long after the delivery of this note to the Company, the defendants obtained a general policy from it, had four or five risks indorsed on the policy, in all about $200; soon thereafter we heard the Company was insolvent, "and we canceled the risks and re-insured;" we re-insured in February or March of that year. The defendants then offered to prove the representations made by *Rich*, relating to the Company, at the time he brought the note to them to be signed. The Court ruled, "that the witness could not state conversations between him and Rich, unless it were shown that Rich was acting in that matter in behalf of the Company" and excluded the evidence, and the defendants excepted.

Josiah Rich was then sworn, and testified that his partner, Knowlton, was a trustee of the Company; that his firm were original subscribers for stock to the amount of $5,000, which was increased to $10,000, which was put in two notes. Before they fell due the firm subscribed $1,000 to the $40,000 subscription. It was after that "proposed to raise, in subscriptions, $400,000 When that was to be done, our firm subscribed for $2,500, with the understanding that we might procure other notes than our own to make it up. We got these two notes from Wilson & Brown and put them in under this understanding, that the Company would take them in place of our own notes for $1,000 of our $2,500 subscription. I communicated to Wilson & Brown the terms of the $400,000 subscription, and the circumstances under which I asked them for their notes. (The defendant offered to prove by this witness the statements and representations made by Mr. Rich to the defendants, on procuring the notes.) (The Court ruled that the testimony was inadmissible, unless the defendants should first show that the witness was acting in that matter, on behalf of the Company, and that it could not be admitted upon the evidence then before the Court. To which ruling the defendants excepted.)

"Q. When you went to Wilson & Brown to get them to sign these notes, for whom were you acting?

"A. When I saw Wilson & Brown before they gave the notes I was acting for myself and the firm of Rich and Knowlton, and so told them; I don't remember precisely how long after this time the Company continued business; I was a trustee some time after transaction."

George H. Tracy was then called as a witness, and testified that he was Secretary of the Company, from May, 1852, to about February 12, 1856. He produced the book of minutes of the Company, the defendants read therefrom a resolution of the 8th of November, 1855, as follows, viz.:

"WILLIAM STREET, New York, Nov. 8, 1855.

"The trustees of the Atlas Mutual Insurance Company met pursuant to notice. On motion, it was resolved that a subscription of $400,000 in premium notes, to be written against, be obtained, subscription to be binding when $300,000 is subscribed, including the $40,000 already subscribed."

That according to his estimate, $300,000 of the $400,000 subscription was made up. When the Company got notes under it, receipts were given similar to those given to Wilson & Brown. The latter were not subscribers. "Their notes were received on account of the subscription of *Rich & Knowlton*. The subscription which they signed was produced and marked 'A,' and is as follows:

"We, the subscribers hereto, agree to give to the Atlas Mutual Insurance Company our notes, in advance of premiums of insurance at six and twelve months, for the sums set over opposite our names respectively, it being understood that in consideration thereof, the subscribers are to be allowed, by the Company, at the maturity of their notes, five per cent on the amount thereof. This subscription is towards the $400,000 subscription authorized by a resolution of the Board of Trustees, of this date, and is not to be binding until the sum of $300,000 is subscribed.

"NEW YORK, November 8, 1855.

"Rich & Knowlton, ... $2,500."

(This was also signed by various other persons and firms.)

That the subscription of $40,000 was previously made, and was included in the computation made, to make up the $300,000. (It was produced and read, and marked "B," and is as follows:)

"We, the subscribers, hereby agree to give our notes for the amount opposite our names, at four months, in advance of premiums to the Atlas Mutual Insurance Company. Notes to be given when $40,000 is subscribed.

"NEW YORK, October 12, 1855."

(It was signed by persons and firms, for amounts, footing up $40,000.)

He further testified, that of the $300,000, other Insurance Companies subscribed $37,000. That the receipt given to Wilson & Brown was not given at its date. That no notes were received until after November 30, 1855. "Receipts of this character were given to some parties who were not subscribers. Wilson & Brown." The receipts for the $40,000 were different, they were all written out. An injunction was served on the Company March 5, 1856. For a day or two before that, no policies had been issued. The Receiver commenced his duties about the 26th of March, 1856. The resolution of the 30th of October, 1855, was then read from the books of the Company, as follows:

"TUESDAY, Oct. 30, 1855.

At an adjourned meeting of the Trustees of the Atlas Mutual Insurance Company, held at office of E. B. Litchfield, the following resolution was, on motion, adopted: That any arrangement made by the Finance Committee in paying or arranging for funds to pay the pressing liabilities of the Company, and to sustain the institution till other means can be provided, if they shall make themselves liable or their friends personally liable, the same shall be considered and treated as confidential, in any event equal in all respects to the amount of $40,000 already subscribed by the friends of the Company for its relief."

Of the $40,000 subscription only $36,000 was actually paid. In November, 1855, Mr. Hinckley was President. Mr. Nelson, a partner of the plaintiff, succeeded him on the 29th of Decem-

ber, 1855, and resigned on the 18th of February, 1856. He did not take risks. Mr. Hinckley did, and so did the witness.

Mr. Nelson attended the meetings of the trustees, held December 29, 1855, and January 14th and 29th, and the 12th of February, 1856. None of the subscribers who subscribed to the $40,000 subscription were repaid out of the assets of the Company. "The note of Wilson & Brown was delivered to Nelson & Sturges, as special Trustees, for the purpose of paying persons who had made loans to the Company. The trust deed was in writing; it was made under a resolution adopted January 29, amending one adopted January 14, 1856, and reading thus, viz.: "The minutes of the last meeting being read, it was, on motion, resolved to amend by inserting the following resolution:

"*Resolved*, That the officers of the Company be and are hereby authorized, to arrange with any parties in or out of the Board of Trustees, for the use of their names, either as makers or indorsers of such paper, as it will be necessary for the Company from time to time to have; and they may give any security and make such allowance as they shall think proper for the use of such paper."

He also testified, that the note in suit "was delivered in pursuance of that resolution." "Rich and Knowlton paid $1,500 of their subscription."

The defendants then called the *plaintiff* as a witness, who testified that he bought the note from Mr. Sturges, and could not tell when he bought it or how much he gave for it, without referring to his books; that he knew the note was one of those held by Mr. Sturges, under the trust deed and resolutions spoken of by Mr. Tracy.

Thomas S. Nelson was next sworn as a witness for the defendants, and testified: "I was elected President of the Atlas Mutual Insurance Company on the 29th December, 1855; * * I so acted until the 14th of February, 1856; * * I acted as trustee, under the appointment of the Company; the trust was in writing; I have not got it now with me; * * we were authorized to take advances of notes from parties, and take notes from the Company, and use them to secure those parties; Mr. Sturges was associated with me; * * this note was handed to us, with others, to secure us for the money we were raising for the Company; my

partner, Mr. Holbrook, I presume knew * * that I was acting as special Trustee for those parties—twelve or fifteen—who had advanced money to the Company; the amount to be raised was about $50,000; a number of notes were collected; * * the money advanced to the Company was never repaid; some of it was collected from proceeds of these notes."

"The defendants applied to the Court for an adjournment, for the purpose of bringing the trust deed spoken of by the witness into court. The motion was denied and they excepted.

They then put in evidence the proceedings in the Supreme Court, by which a receiver was appointed to wind up the affairs of said Company, and rested. (No other witnesses were examined, and the foregoing is the substance of all the testimony given or offered at the trial.)

"The Court inquired of defendants' counsel what questions of fact he desired to have submitted to the jury, and as to which there was, in his opinion, any conflict of evidence making such submission proper? to which he replied that he desired that the following questions should be submitted to the jury:

"1. Whether the receipt given for the note in suit to the defendants, by the Insurance Company, places these defendants in a situation to take advantage of all the defenses that a subscriber to the $300,000 subscription could interpose?

"2. Whether the Company took the note with knowledge of circumstances impeaching its validity?

"3. Whether the plaintiff did not take it with knowledge of the circumstances under which it originated, and was delivered to the Company?

"The defendants insisting that the Insurance Company was estopped to deny it was a subscription note under the $300,000 subscription, or that the defendants have not all the legal and equitable defenses of an actual subscriber. The Court stated that the evidence did not require the submission of these questions to the jury," and thereupon directed a verdict for plaintiff.

"The defendants excepted to the ruling and decision of the Court, as last stated, and to every part thereof.

"The jury, under the direction of the Court, found a verdict for the plaintiff for $546.60, being the amount of the note and interest."

The Court then ordered that the questions of law arising on the exceptions taken be first heard at the General Term, and that the entry of judgment be in the meantime suspended.

The cause was submitted to the General Term without argument, on a case containing the exceptions, and on printed points. The points were as follows:

Charles N. Emerson, for the defendants.

I. The Court erred in instructing the jury that there was nothing for their consideration; that the facts proved did not constitute a defense.

It should have been submitted to the jury, upon the evidence, whether the Company did or did not receive the note as a "subscription note," and whether the defendant did not give the note with the understanding that it was to be used and applied under the terms and stipulations of the receipt which was given to the defendants for it.

II. The Company would have been estopped from saying that the note was *not* a subscription note, if the action had been in the name of the Company, or in the name of the Trustees of the Company.

III. Had the case been submitted to the jury, all the legal and equitable defenses arising out of the illegal subscription of $300,000, made under the resolution of November 8, 1855, would have been open to their consideration. But the Court, while admitting the defendants to offer the same defenses in this suit as would have been admissible in a suit upon the note by the Company, deprived the defendants of all benefit of this defense, by passing upon the questions of *fact*, independent of the jury.

IV. The note in the hands of the Company or their Trustee was void, for non-compliance with the terms of the subscription upon which it was given, and, as the defendant claims, received by the Company through Mr. Rich. (*Berry*, receiver, v. *Yates et al.*, N. Y. Times, April 25, 1857; *Stewart* v. *Hamilton College*, 2 Denio, 403; *E. Anglian R. Co.* v. *Eastern Co. R. Co.*, 7 Law and Equity R., 505.

V. The note *was* given to the Company. Rich & Knowlton had made a subscription to the amount of $2,500. He, Rich, applied to defendants to assume $1,000 of *that* subscription, by

their notes. It was not a loan of money to Rich & Knowlton, but an assuming on the part of the defendants of a part of Rich & Knowlton's liability under that subscription. And the same defense which Rich and Knowlton would have had, to a suit upon the note, was open to these defendants.

VI. The plaintiff was a holder of the note, and received the same with full knowledge of all the legal and equitable defenses to its collection. He received it unlawfully, it being a diversion of the funds of the Company from the legitimate purpose to which they should have been applied, and also in fraud of the agreement under which the note was given, as contained in the receipt.

VII. The Company and the plaintiff, as privy with the Company, are estopped by the receipt given for the note, to deny that it was a note such as is described in the receipt, "*being a subscription note to the Atlas Mutual Insurance Company, to be used by the Company for the purpose of paying the losses of the Company, or to be used in raising money to be applied to the payment of said losses.*"

The note was applied to an entirely different purpose. (*Drury* v. *Fay*, 14 Pick., 326; *Chapman* v. *Searle*, 3 id., 38; *Tremble* v. *The State*, 11 Blackf., 435; *Love* v. *Kidwell*, id., 553; *Layoze* v. *Priman*, 3 Miss., 529; *Jackson* v. *Parkhurst*, 9 Wend., 209; *Rogers* v. *Haines*, 3 Green, 362; *Stewart* v. *Butler*, 2 S. & R., 381.)

A party is estopped from denying the truth of a recital, which goes to the substance of the contract or the consideration of the contract in question, upon the faith of which recital another party to the contract has acted, knowing at the same time that the other's conduct was materially influenced by a reliance upon the truth and good faith of the recital. (*Hicks* v. *Crane*, 17 Vt., 449; *Rangeley* v. *Spring*, 8 Shep., 130.)

VIII. On the 8th November, 1855, The Atlas Mutual Insurance Company voted that a subscription of $400,000 be obtained in premium notes to be written against—the subscription to be binding when $300,000 is subscribed. The subscription was commenced, and these defendants, through Rich & Knowlton, on the same day, gave the note in suit. It never became a valid note, from the non-compliance with the condition upon which it was given. $300,000 was not subscribed by persons entitled by

law to subscribe, and the consideration of the note utterly failed. (See Testimony of Tracy; *Berry*, receiver, v. *Yates*, before cited, 24 Barb. S. C. R., 199.)

The defendants submit that the direction of the Court, to the effect that there was nothing for the jury to pass upon, and that a verdict should be returned for the plaintiff, was erroneous, and that a new trial should be ordered.

William Britton, for the plaintiff.

FACTS.

1. This action is upon a promissory note given by the defendants, in accordance with an agreement with Mr. Rich, acting for and on behalf of Rich & Knowlton.

2. Rich & Knowlton induced defendants to make the note and deliver it to the Atlas Mutual Insurance Company, towards a subscription made by the said Rich & Knowlton, by which they agreed to give their notes, or substitutes to be procured by them in advance of premiums, and for other considerations.

3. No representations were made by the Company to obtain the note.

4. The Company gave a receipt for the note after delivery to them, expressing that the note was "to be held and used by the Company for the purpose of paying the losses of the Company, or to be used in raising money to be applied in payment of said losses," and expressing its consideration, to wit, that defendants would be entitled to insure against it, and to an allowance of five per cent.

5. Defendants did actually insure against it.

6. The note was transferred by the Company to Nelson & Sturges, as collateral security to a loan made by them to the Company, not paid when this suit was brought.

7. Nelson was a trustee of the Company, and acting President when the note was so transferred.

8. Plaintiff is partner of Nelson, and then was, and bought the note of Nelson & Sturges (the latter in person) for full value paid, with knowledge of the circumstances under which they held it.

POINTS.

No error was committed at the trial, and judgment was properly ordered for plaintiff; for—

I. The answer alleges (1) fraudulent representations on the part of the Atlas Mutual Insurance Company, by which they procured the note, and (2) a fraudulent misappropriation of the said note, with notice to the plaintiff.

II. Under these issues, no error was committed in the exclusion of the representation of Rich. Rich was not acting for the Company, but for his own firm, and had no authority to, nor did he seek to bind the Company by any representations. He so stated expressly.

III. No error was committed in declining to submit to the jury the propositions requested at the conclusion of the trial to be submitted, for—

1. There was no conflict of testimony in the case. Every witness examined was sworn on behalf of the defendants, and there was, for this reason, nothing for the jury to pass upon.

2. The first proposition involved merely a question of law.

The second assumes that there was evidence showing or tending to show circumstances impeaching the validity of the note in its inception, which there was not; and

The third, if answered affirmatively, could not avail the defendants, the circumstances of its inception furnishing no defense.

IV. Judgment for the plaintiff was properly directed; for—

1. The note was given in accordance with an agreement made with Rich & Knowlton and for their benefit, and not for that of the Company, for Rich & Knowlton procured it to consummate an arrangement made between the Company and them, and not the defendants, and defendants gave it for a valuable consideration received by them. (*Brouwer* v. *Appleby*, 1 Sandf. R., 158.)

2. Defendants were therefore no parties to the agreement between Rich & Knowlton and the Company, and could not be affected by the conditions of such agreement.

3. But if they were, there is no evidence even that the conditions of the agreement between Rich & Knowlton and the Company were not performed, or that Rich & Knowlton themselves would have had any defense if their note had been given by them, and defendants can be in no better position.

4. The note was transferred to Nelson & Sturges by the Company, in exact accordance with the stipulation contained in the receipt given by the Company, to wit: "to be used in raising money to be applied in payment of losses of the Company."

5. There is no evidence whatever of any fraud on the part of any one either in procuring or using the note.

6. The plaintiff took the note, for value, from Nelson & Sturges, and in absence of fraud known to him, is entitled to recover.

7. Judgment should be ordered for plaintiff in accordance with the verdict.

By the Court—Hoffman, J. The defendant, Wilson, being examined as a witness, on behalf of the defendants, it was offered to prove certain representations made to him by one Rich, as to the affairs of the Atlas Insurance Company, when the defendants gave the note in question. The offer was ruled out, unless it was shown that *Rich* was acting in that matter on behalf of the Company.

We think this ruling was correct. The plaintiff was making title through the Company. He could not be bound by declarations or statements, not made by them or their authorized agents.[1]

The like remark applies to the next exception, to the rejection, by the Judge, of questions addressed to the witness *Rich*, himself, when he was produced as a witness to the same point. Rich is in no way connected with the Company so as to make his statements equivalent to their own.

To understand the exceptions as to the refusal to submit the specified questions to the jury, some facts should be noticed.

Rich & Knowlton were original subscribers to the stock of

[1] The answer states that "the officers of said Company" made certain false representations to the defendants to induce them to give the note; that they gave it, relying on the truth of those representations. The Judge excluded evidence of representations made by *Rich* to defendant, Wilson, "unless it were shown that Rich was acting in that matter in behalf of the Company;" and may have excluded it on the ground that no such defense, as was offered to be proved by Rich, had been set up in the answer. (*Brazil* v. *Isham*, 2 Kern., 9.) *Wilson*, before evidence of the representations made to him by Rich had been excluded, had testified "that no representations were made to us by any officer of the Company." (*Ante*, p. 67.)—*Rep.*

the Atlas Mutual Insurance Company. A proposition to increase the stock, having been made among the parties interested, Rich & Knowlton subscribed $2,500, with the understanding that they might procure other notes than their own to make it up. They got two notes from the defendants; one of which is that in suit. The Company agreed to take those notes in place of Rich & Knowlton's notes for $1,000, part of the $2,500. The defendants knew of these circumstances. Receipts were given to the subscribers, similar to the one in evidence given to the defendants. By the agreement made upon the new subscription, (which was to be for $400,000,) no subscription was to be binding until the sum of $300,000 was subscribed. Testimony was given as to this subscription being filled up to that amount. All the evidence was produced by the defendants. The defendants contended that the subscription was not full; that their's was a subscription note; that the condition had not been complied with; that the Company could not have collected the note; and, as the plaintiff took with knowledge, he was in no better position.

The defendants, then, must be taken to have made out, by their own uncontradicted and unquestioned evidence, the best case they were able to make; and the question, whether they have established a legal defense on that evidence, becomes a question of law. There was nothing of contradictory or discrepant testimony for the jury to weigh.

The effect of the receipt as tending to constitute a defense was of this nature: The inquiry, whether the Company took the note with knowledge of circumstances impeaching its validity, was not a question for the jury. A jury should be asked to pass upon the question of knowledge of particular facts; but whether, if known, they impeach the validity of a note, is for the Court to determine.

The third question was, in point of fact, answered in favor of the defendants, by the admission of the plaintiff and the other testimony.

None of the exceptions being tenable, the question arises upon the case, whether the judgment on the verdict ought to be for the plaintiff or the defendants. (Code, § 265.)

It has been decided in this Court that, where a note, given on a subscription like the present, had been transferred before matu-

rity to a bank to be discounted, with other notes, for the general purposes of the Company holding it, the bank could recover, unless chargeable with notice of an intended and actual misappropriation. (*The Central Bank of Brooklyn* v. *Lang*, 1 Bosw. R., 202.)

The Company, in the present case, knew that the note was given as part of Rich & Knowlton's subscription, and the defendants were apprised of the nature and object of this arrangement. Nelson took the note, either as trustee for parties who had previously loaned money to the Company, or to use for the purpose of securing parties who should lend their notes as makers or indorsers, for the benefit of the Company.

I shall assume that Nelson stood in no better position than the Company; nor the plaintiff in a better one than Nelson. Then if the Company could not recover upon one of Rich & Knowlton's notes, given for the remaining $1,500 of the subscription, the plaintiff cannot recover on the present note.

This brings us to the question: Have the defendants shown that the condition was not fulfilled? They have given a promissory note; have failed to establish any fraudulent representations, which could defeat the Company's claim upon it; and if they could avail themselves of an exemption arising from the failure of a condition upon which they alleged the note was given, they must make out that failure fully and explicitly. It is similar to the rule declared in *The Bank of the United States* v. *Davis*. (2 Hill, 459.)

The defendants have fallen short of doing this. The Secretary of the Company, called by themselves as a witness, states that $300,000 was made up, not including the amount marked in pencil on the subscription books. The previous subscription of $40,000 was included in this estimate. Why it should not be so does not appear. He adds, that of the amount of $300,000, the sum of $87,000 was subscribed by other Insurance Companies; but there is no evidence to show what Companies subscribed, nor that they were prohibited from subscribing, or could not lawfully do so. The witness says, also, that the $40,000 was not all paid in notes or cash; $36,000 only was. He included the $40,000 in his estimate; that it was payable in four months; $36,000 was paid in notes.

This is the whole of the evidence; all supplied by the defendants themselves. They have not proved that the subscription was not filled up to $300,000, as required.

But again, if this were doubtful, there is another view of the case, which seems decisive against the defendants. Have not the parties waived the objection that the subscription was incomplete by giving their notes? It may be that had they been sued for the subscription money, the defense would have availed them; but the delivery of the notes was either a waiver of the condition or an admission that it had been complied with.

It is sworn to by Rich, that when he got the notes of the defendants, he informed them of the terms of the $400,000 subscription. The note was given and made on the 8th of January, 1856, though dated the 8th of November, 1855, and the receipt was given after the note, though dated in December, 1855. The terms of the resolution of November 8, 1855, were, that the subscription was to be binding when $300,000 was subscribed. There was nothing as to restoring notes or refunding cash if the subscription fell short; and I think that the giving of the notes, two months after the resolution, and with a knowledge of its terms, was an implied admission of the defendants being satisfied as to the filling up of the stock.

The plaintiff must have judgment upon the verdict.

Ordered accordingly.

THE FARMERS' LOAN AND TRUST COMPANY, Plaintiffs and Respondents, v. THE MAYOR, &C., OF NEW YORK, Appellants.

1. The hiring of a pier by the Mayor, Aldermen and Commonalty of the City of New York, for the purpose of removing offal from the city, is a transaction not affected by the provisions of §. 12, of chap. 217, of the Laws of 1853. (P. 412.) The use of the pier hired for such a purpose, and used accordingly, is not work done, nor a supply furnished within the meaning of that section.

2. Neither the Mayor nor the Comptroller of said city, has the power, as such officer, to hire property for such a purpose, so as to render the city corporation liable to pay for such use.

3. Where it appeared that a pier belonging to a third person (the plaintiffs) had been taken and used for such a purpose, from the 8th of July, 1851, to the 29th of May, 1854, by the direction of the Mayor and City Inspector of said city; and that the owners of the pier remonstrated with the Mayor, and he replied "that he had ordered the boats to go there, and he would keep a police force to prevent her being driven away; and furthermore, that we," (the plaintiffs,) "should be paid for the use of our property;" and that the Comptroller had paid to the plaintiffs at one time, by a warrant drawn on the Chamberlain of the city, for such use of the pier up to July 8, 1853, at the rate of $1,200 a year; and that in April, 1852, the city, by its City Inspector, (he being thereto authorized by an ordinance or resolution adopted April 17, 1852,) made a valid contract with one Reynolds for the removal by him of offal from the city, and therein agreed "to set apart two of the docks and slips of the city of New York, one on the East river and one on the North river, to be used by Reynolds, under the direction of the City Inspector, as a place of landing for the boats required by him for removal of substances mentioned in said contract;" and that Reynolds used such pier as a place of landing for such boats until May 29, 1854, with the knowledge of the said Mayor and City Inspector; and that such use was made in removing offensive substances from the city, under the direction of the City Inspector, under the said ordinance authorizing him to so contract with said Reynolds, and that such use existed before and at the time such ordinance was passed and contract made; it was *held*, in an action against the defendants to recover for the use of such pier from July 8, 1853, to May 29th, 1854;

4. *First*, That such facts did not constitute *prima facie* evidence that the corporation had hired such pier, by a contract to that effect, made by any of its officers authorized to contract for it in that behalf.

5. *Second*, That they did not furnish *prima facie* evidence of a ratification by defendants, of any unauthorized contract of hiring made by its agents in its behalf.

6. *Third*, That the City Inspector had no power to designate the piers which Reynolds was to use under his contract. The corporation, by their contract, only contracted to designate two of the piers actually owned by the city.

7. *Fourth*, That the defendants were not liable for the use made by Reynolds of the plaintiffs' pier.

(Before BOSWORTH, Ch. J., and HOFFMAN, J.)

Heard, November 8, 1858; decided, January 29th, 1859.

THIS is an appeal by the defendants from a judgment entered against them, upon the report of Henry Nicoll, Esq., as referee.

The complaint is as follows: (Title.)

"The complaint of the above named plaintiffs respectfully shows unto this court, that the above named defendants are now justly indebted unto the said plaintiffs in the sum of one thousand and seventy dollars, with interest, for the use and occupation by the said defendants of a certain pier or wharf of the said plaintiff's, situate on the East river, between Thirty-Fourth and Thirty-Fifth streets, in the city of New York, which said pier was occupied, possessed, and enjoyed by the sufferance and permission of the said plaintiffs, for a long space of time since elapsed, that is to say, from the eighth day of July, 1853, until the twenty-ninth day of May, 1854, and for which said use and occupation, they, the said defendants, undertook and faithfully promised the said plaintiffs to pay them so much money therefor, as they therefor reasonably deserved to have of the said defendants, when the said defendants should thereunto be requested; and the said plaintiffs say, that they therefor reasonably deserved to have of the said defendants the sum of one thousand and seventy dollars, of which the said defendants had notice; and although often requested, they have hitherto refused, and still do neglect and refuse to pay the said sum of money to the said plaintiffs.

"Wherefore the said plaintiffs demand judgment in this action against the said defendants for the said sum of one thousand and seventy dollars, with interest from the twenty-ninth day of May, 1854, besides costs."

The answer is merely a general denial of each and every allegation contained in the complaint.

The finding of the referee is as follows:

I. That on the 30th day of May, 1849, an ordinance, entitled, "An Ordinance organizing the Departments of the Municipal Government of the City of New York, and prescribing their powers and duties," was passed by the defendants in Common Council convened, and approved by the Mayor.

II. That said ordinance was in existence and in force on the 8th day of July, 1851.

III. That by said ordinance there is established a City Inspector's Department as one of the Departments of the said Municipal Government, the chief officer of which department is denomi-

nated the City Inspector, who is required by said ordinance to take all necessary measures to ascertain every nuisance and cause it to be removed, and also to cause all putrid beef, dead animals, and every other putrid and offensive substance found in any street or other place in the city, to be forthwith removed and cast into the river from the nearest wharf, or otherwise disposed of so as most effectually to secure the public health.

IV. That in the month of July, 1851, one William B. Reynolds was engaged in the business of removing offensive substances in the city of New York, under the direction of the City Inspector of the defendants.

V. That said Reynolds for that purpose had certain boats required and used in carrying off the said substances from said city.

VI. That the said Reynolds on or about the 8th day of July, 1851, by the direction of the Mayor of the City of New York, and of the said City Inspector, and against the wishes of plaintiffs, took forcible possession of the pier or wharf belonging to the plaintiffs in the complaint mentioned.

VII. That the said Reynolds used the same as a place of landing for said boats, and continued so to use the same for such purpose, under the direction of the City Inspector, and against the remonstrances of the plaintiffs, from the 8th day of July, 1851, to and including the time of making the contract hereafter mentioned.

VIII. That the said defendants, in May, 1852, in Common Council convened, passed a resolution, approved by the Mayor of said city, on the 17th day of April, 1852, empowering the said City Inspector to contract with said Reynolds, for the removal of dead animals and other offensive substances beyond the limits of the city of New York, under the immediate direction of the City Inspector for a term of five years.

IX. That in conformity with said resolution, said defendants, by A. W. White, then the City Inspector of the defendants, on the 24th of April, 1852, made a contract with Reynolds, which is the contract set forth in the case herein.

X. That said defendants agreed by said contract to set apart two of the docks and slips of the city of New York, one on the

East river and the other on the North river, to be used by Reynolds, under the direction of the City Inspector, as a place of landing for the boats required by him for removal of substances mentioned in said contract.

XI. That said Reynolds used and occupied the wharf or pier of the plaintiffs as a place of landing for the boats required for the purposes aforesaid, and, after the making of the said contract, continued to use and occupy the same until May 29th, 1854.

XII. That such use and occupation by the said Reynolds were with the knowledge of the Mayor and City Inspector of the defendants, and such use and occupation having been also in the business of removing offensive substances in the city of New York, under the direction of the said City Inspector under the ordinance aforesaid, and for no other purpose, and said use and occupation continuing and existing at the time of the making of the aforesaid resolution by the defendants in Common Council convened, in May, 1852, as well as at the time of making the aforesaid contract with said Reynolds, in pursuance of said resolution, and thenceforth up to the 29th day of May, 1854, such facts are sufficient evidence that said use and occupation was with the knowledge of the defendants, and the referee therefore finds the facts so to be.

XIII. That for the use and occupation of said pier from the 8th day of July, 1853, until the 29th day of May, 1854, the plaintiffs reasonably deserve to have $1,070, of which the defendants, on said last mentioned day, had notice.

XIV. That the defendants, although requested to pay the same, have refused to pay said sum to plaintiffs.

The referee found the following conclusions of law:

I. That the evidence aforesaid was and is sufficient to sustain the finding of fact, that the use and occupation aforesaid was with the knowledge of the defendants.

To which said conclusion of law and decision of the said referee the defendants duly excepted.

II. That the defendants are indebted to the plaintiff for the use and occupation of the pier aforesaid, from the 8th day of July, 1853, to the 29th day of May, 1854, in the sum of $1,070, with interest from the 29th of May, 1854.

To which said conclusion of law and decision of said referee the defendants duly excepted.

III. That the plaintiffs are entitled to judgment for the aggregate of said amount of $1,070 and interest as aforesaid, being $1,356.50.

To which said conclusion of law and decision of said referee the defendants duly excepted.

It appeared, also, in evidence, that the boats employed to remove the offal, termed by a witness, (the President of the plaintiffs,) "nuisance boats," were at the pier from July 8, 1851, until May, 1854; and that he, the witness, collected from the Comptroller of the City two years' rent, viz.: From July, 1851, to July 8, 1853. The amounts paid were at the rate of $1,200 a year. The President was informed by the Mayor of the City, (on remonstrating with him for taking possession of the pier,) that he would keep a police force to prevent the boats being driven away, and that the plaintiffs should be paid for the use of the property.

The ordinance of the 17th of April, 1852, was, by consent, read in evidence, and the first, second, and fifth sections, all that are deemed material, are as follows:

"§ 1. There shall be designated and set apart, for the use of the City Inspector, two of the docks and slips of the city of New York, one on the East river, and the other on the North river; said docks and slips shall be under the sole authorized direction of the City Inspector; and shall be used by him as a place of landing for such boats as may be required for the removal of the butcher's blood," offals, &c., from the city.

§ 2. No ship or vessel shall come in or lie at any of said docks or slips, designated as aforesaid, without permission of the City Inspector. By section four, the City Inspector was to give licenses to carts, (to be furnished by contractors for removing offal,) to remove the offal.

§ 5. No dead animal shall be cast or thrown into the East or North rivers, or any waters within the limits of the city; but shall be removed by the persons licensed, as aforesaid, for that purpose, to the docks and slips of the City Inspector.

Judgment was entered on the report, on the 13th of March, 1858, in favor of the plaintiffs, against the defendants, for the

sum of $1,541.31, from which judgment, the present appeal was taken.

D. E. Sickles, for defendants, the appellants.

M. S. Bidwell, for the respondents.

I. It was proved, by competent and sufficient evidence, that the pier was taken possession of and occupied from the beginning under the authority and for the benefit of the defendants.

1. Reynolds was employed by them, under a contract which has been adjudged to be valid, (*People ex rel.* v. *Flagg*, 16 Barb. R., 503,) to remove offal from the city; and the defendants engaged by that contract to furnish him with the use of a pier for that purpose; the pier to be so used was to be set apart and designated "under the direction of the City Inspector."

2. The pier was used by Reynolds, in the execution of the contract, for that purpose.

3. There was evidence to show it was so occupied with the knowledge and consent, and by the direction and designation, not only of the Mayor, but also of the City Inspector, who was the proper officer and agent of the defendants for that purpose, (Laws of 1849, p. 282, § 16; City Ordinances of May 30, 1849,) and who was the officer authorized and appointed by the defendants to do this very act.

4. The defendants did not provide or designate any other pier for the purpose. This fact, in connection with the actual use and occupation of the plaintiffs' pier by Reynolds, under the direction of the Mayor and City Inspector, furnished at least strong presumptive evidence that the defendants authorized this pier to be taken under their contract with Reynolds.

5. No separate resolution or appropriation was necessary.

II. Even supposing the taking occupation of the plaintiffs' pier was originally unauthorized by the defendants, yet the payment of rent by the Comptroller, (the proper disbursing officer of the corporation,) for two years, is evidence of a ratification of the contract by them, and of a hiring on their part from year to year at the rate of $1,200 per annum. (*Hayward* v. *The Pilgrim Soc.*, 21 Pick. R., 275; *Wood* v. *State*, 5 Bos. and Pull., 246, 248; *Doe & Carlisle* v. *Woodman*, 8 East., 228.)

It is to be presumed that this payment was stated in his accounts and report, and was known to the Mayor and Common Council. (1 Cow. and Hill, 296, 297; Best on Presumptions, 68, 31 Law Lib.)

III. Even supposing the payment of rent by the Comptroller insufficient to bind the defendants, so far as to raise the presumption of a letting from year to year, the plaintiffs are still entitled to recover on a *quantum meruit;* no express promise need be shown, and one may bring assumpsit for the use and occupation of his property, though originally taken without his consent. (1 Hill, 240, note A.)

IV. As to the objection that all work to be done or supplies to be furnished for the corporation, involving an expenditure of more than two hundred and fifty dollars, must be by contract, &c., (Laws of 1853, chap. 217, p. 412, § 12,) there are several answers.

1. There was a contract; the defendants contracted to provide a dock, &c., and this pier was taken and set apart under that contract. The case is, therefore, within the very letter of the law, and it is clearly within its spirit; the abuse which this law was designed to prevent was guarded against as effectually by this contract, as if a contract had been made with the plaintiffs themselves for this pier.

2. The law has no application to this case, because,

1. The action is not brought for "work done or supplies furnished" for the corporation, the use and occupation of the plaintiffs' property not being the one or the other; and as the statute is interposed in support of an objection that is most inequitable, and in derogation of common law and common right, it should be construed literally and strictly, and not extended to a case not within its very words; especially, as in this case, such a construction will not be inconsistent with the great object of it, or countenance the mischief which it was intended to prevent.

2. The statute has no application to executed contracts; at least it does not apply so far as to defeat a recovery to the extent of the benefit which the defendants have actually received.

V. By the express contract between the defendants and Reynolds, they were to provide a pier for him.

If they had not done it, he would have had a right to provide it at the defendants' expense, and to recover the value of such accom-

modation from the defendants. If he obtained such accommodation from the plaintiffs, they are entitled either to sue the defendants, on the ground that Reynolds was their agent in using the pier, or upon the principles of equity jurisprudence, to be substituted in his place, and subrogated to his rights, in which case the provisions of his contract will enure to their benefit.

If, upon the other hand, the defendants did provide a pier for Reynolds, pursuant to their contract, then, as it was no other than the plaintiffs' pier which they used for that purpose, they cannot deny having used and occupied it; and upon that ground the plaintiffs are entitled to compensation from the defendants.

So that, *quacunque via data*, we come to the conclusion that the plaintiffs were entitled to recover from the defendants a just compensation for the use of their property.

The judgment should be affirmed with costs.

By the Court—Hoffman, J. The first and an important question is, whether the twelfth section of the charter of 1858 applies to the case. The question is one of great practical moment beyond the decision of the present action. The counsel of the defendants insists that it controls. The counsel of the plaintiffs has made several points to show that it is inapplicable.

That section provides "that all work to be done, and all supplies to be furnished for the corporation, involving an expenditure of more than $250 must be by contract founded on sealed bids, or on proposals made in compliance with public notice for the full period of ten days; and all such contracts, when given, shall be given to the lowest bidder, with security."

In the case of *Brady* v. *The Mayor, &c., of New York*, in this court, (2 Bosw., 173, and 7 Abb., 238,) it was held, that where a contract under which work had been done was void, because entered into in violation of this provision of the charter, the contractor could not recover for the work in any form; neither under the contract, nor as upon a *quantum meruit*. A subsequent ratification was of no more validity than the original contract. If this were allowed, this restriction in the charter would become practically null, and the officers and agents through whom alone the corporation can act, might disregard the statute, and in practice repeal it. The difficulty lies, not merely in the want of original

power in the agents to make the contract, but in the want of power in the corporation itself to make the contract, otherwise than in the mode prescribed by the charter.

If then the present case is within the provision, nothing short of an express contract entered into after full compliance with its directions, could be binding upon the corporation.

It may be, as the learned counsel of the plaintiffs contends, that in the ordinary acceptation of the terms, the hiring of a pier for public purposes was neither "work done," nor "supplies furnished." Yet an enlarged etymological sense of the word "supply" comprises anything *yielded or afforded*, to meet a want.

It is clear however, that there must be a class of cases, in which the very object of the exercise of a municipal power, would indicate the inapplicability of the provision. The establishment of a market within a particular district of the city calls for the exercise of a discretion in choosing the locality, so as to meet the convenience of the greater number and facilitate the means of cleansing, which might be wholly defeated or impaired if the corporation was compelled to advertise and take the plot of ground offered by the lowest bidder. The selection of piers for the purpose of casting away the offal of the city, falls within the same principle. It would be a misuse of power, to take for this purpose a pier daily thronged with carts and laborers, for loading or unloading the cargoes of vessels. The particular force and direction of the tide may render one spot far more eligible than another. The distance from dwelling houses would be another element of consideration.

In the case of *The People* v. *Flagg* (17 N. Y. R., 584), it was strongly urged by Judge COMSTOCK that the construction of the phrase "work to be done" used in this provision, did not extend it to the making of a survey and maps by a surveyor requiring skill and professional knowledge for its performance. "This would be an unreasonable and mischievous construction of the statute." Justice ROOSEVELT was of a different opinion on the facts of that case; and the Court abstained from expressing an opinion upon the point.

It appears to me that the principle contained in the opinion of Judge COMSTOCK applies with even greater force to the cases I have suggested, than to the one before him.

It may perhaps be found upon a more extended investigation of the extent and meaning of the provision, that it does not apply to cases of the acquisition of real property by purchase or hiring for the purposes of municipal government, within acknowledged powers of the corporation. It may be that the phrase is used in the sense in which it is employed in the commercial law, and in various statutes, as relating merely to personal property, going into or forming part of something else or contributed for the use of something else, or towards its efficiency. The maritime doctrine as to supplies for ships, the State Statutes in aid of materialmen are instances of this nature. (4 Wheat., 438; Kent's Com., vol. 3, p. 169; 1 Blatch. & Howl., 177; 2 R. S., of 1830, 493; *The Calisto*, Daveis R., 31.)

It is in this sense that the phrase is used in various enactments connected with the government of New York. Thus, in section 13 of the charter as amended in 1849, there is constituted an Executive Department called The Department of "Repairs and Supplies," having cognizance of all repairs and supplies of and for roads and avenues, pavements, fire engines, &c.

So in section 14, the department of streets and lamps shall have cognizance of procuring the necessary supplies for, and of lighting the public streets, &c.

And section 23 of the same chapter provides, that "all contracts to be made or let by authority of the Common Council for *work to be done* or supplies to be furnished," and all sales of personal property shall be made by the appropriate heads of departments, under such regulations as shall be established by ordinances.

All the previous sections establishing departments contemplate expenditures distinct from any acquisition of real estate. No such power is any where granted to or is to be inferred as possessed by either of them.

But without pursuing this subject further, or attempting to define either what is comprehended in or what is excluded from the purview of the provision in question, it is sufficient to say, that in our opinion the hiring of a pier by the corporation for the purpose of removing offal from the city, is not within it.

We must, therefore, proceed to the other questions in the cause.

2. The right to hire a pier for the purpose of fulfilling the duty of the corporation in the removal of nuisances, is a power

inherent in the Common Council, because necessary or important for the exercise of an admitted and vested power. The charters gave the corporation power to hold land in fee simple to them and their successors forever; but a restriction was imposed in the Montgomery Charter, that the annual income should not exceed £3,000 sterling. (See upon the subject of this restriction, Kent's Notes, note 48; 2 Coke's Inst., 722, and *Flagg* v. *Lowber*, 7 Abb. R., 176.)

Whatever may be the legal operation of this restriction at the present day, it was a restriction upon the right to hold lands in perpetuity, which right, upon common law principles belongs to a corporation. (2 Kent's Com., 281.) It does not affect the present question, which relates to a power to hire lands for a particular period, in order to fulfill a duty, and in the exercise of a power necessary, for municipal purposes. That authority which is material in order to execute the purposes for which a corporation is created, is possessed by implication. (1 R. S., 1830, 600, § 3; 4 Hill, p. 39, 13 Mass. R., 199.)

The late case of *The People and Flagg* v. *Lowber* (7 Abb. R., 176), illustrates this view. The power to purchase land for a market site was held to attend and result from a power to establish markets, and the restriction as to income before referred to, was held inapplicable.

3. Whether the Common Council have lawfully done anything out of which its liability for the rent can arise is in the next place to be examined.

As I understand the claim, it is rested upon these several propositions: *First.* That the Comptroller could create this liability, and has done so; *next,* that the Mayor could do it, and his engagement is proven; *again,* that there was an implied ratification of the payment by the Comptroller, from the assumed knowledge of his disbursements, and therefore a hiring by the Common Council; and *lastly,* that the resolution of April 17th, 1852, and the contract with Reynolds, establish the responsibility.

The two first propositions may easily be disposed of. There is not the semblance of power in the Comptroller or Mayor, to hire property for the purposes in question, and bind the corporation to pay for it.

The next ground, of an implied ratification, is also unsatisfactory. It could not, I think, extend further than to prevent the corporation from recovering back the money paid over, admitting that this would be its effect.

The ordinance of May, 1849, gave to the City Inspector power to remove dead animals, &c., and to cast them into the river, three hundred feet from the nearest wharf, or otherwise to dispose of them as most effectually to secure the public health. The first clause of the ordinance may, perhaps, be so reasonable as that the Inspector would be warranted in going upon a private pier, merely to cast the carcasses into the river. But there is nothing in it to warrant the hiring of any pier or wharf for any of his official purposes.

The possession of the pier taken by Reynolds, under the direction of the City Inspector and Mayor, in July, 1851, was forcible. It did not profess to be in the exercise of a power to contract; and there was no such power in either of them.

The contract with Reynolds, of the 24th of April, 1852, was valid, and has been decided to be so. (16 Barb., 503.) By that contract, the corporation, by A. W. White, City Inspector, agreed, "in pursuance of *the first section* of an ordinance of the 17th of April, 1852, to designate and set apart for the use of the City Inspector, two of the docks and slips *of the city of New York*, one on the East river, and the other on the North river, to be used by Reynolds, under the direction of the City Inspector, as a place of landing of the boats to be employed for the removal of the offal, dead animals, &c., the free access to and use thereof, to be secured to said Reynolds.

The first section of the ordinance does not contain any power for any officer to hire a pier. It provides that there shall be designated two docks or slips of the city, for the use of the City Inspector, to be under his control, and to be used by him as a place of landing for the boats required.

I have concluded that the corporation, in this ordinance, did nothing more than to agree to designate two of the piers *actually owned by the city*, to be used for these purposes; and that the liberal construction insisted upon, that they covenanted to designate one of their own piers, or to procure a pier of another party, is inadmissible.

Thus it stands, under all these documents, that the corporation was itself to designate a public pier, and did not even give the City Inspector power to do so; and what is of more importance, a construction cannot be sustained which implies the hiring of a private pier, or the delegation of any power to any one to do so.

Now, it is true, and sustained by cases, some of which were cited, that it is a sound rule of law, that whenever a corporation is acting within the scope of its legitimate purposes, all parol contracts made with its authorized agents are express promises by the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises for which an action may well lie. (STORY, Justice, 7 Cranch., 306; *Fister* v. *La Rue*, 15 Barb., 323; *Randell* v. *Van Vechten*, 19 Johns. R., 60; *Clarke* v. *Guardians of Cuckfield Union*, 11 Eng. L. & Eq. R., 442.)

But in all such cases, either a duly authorized agent fixed the liability of the body, or it recognized the obligation to pay, by accepting the work or services or supplies. Where it possesses original power to make the contract, it may recognize a duty to pay for what has been done without contract, although if destitute of such original power the case is different. (*The People* v. *Flagg*, 17 N. Y. R., 586.)

In the present case, there was no act which could be treated in any way as tending to a ratification, except the unauthorized payment of rent, by the Comptroller, on some occasions. This is wholly insufficient.

It is impossible, also, to support the proposition, that the mere fact of rendering services to the corporation, and of that body reaping a benefit from them affords a ground of action. (17 N. Y. R., 591.)

These conclusions render it unnecessary to discuss the question, whether as the origin of the possession was the forcible entry upon the plaintiffs' land, a suit for the value of the occupation, as for rent, can be maintained. The City Inspector and Reynolds, perhaps the Mayor, were, on the facts found, trespassers; could have been turned out, and been made responsible for *mesne profits*. (1 Wend., 134; 1 R. L., 1813, p. 444, § 31; *Smith* v. *Stewart*, 6 Johns., 46; *Osgood* v. *Dewey*, 13 id., 240.)

A new trial must be granted, with costs to abide the event.

Ordered accordingly.

LUIGI GALLARATI v. JOHN ORSER, Sheriff.

1. When an order is duly made for the arrest of a defendant, in the case prescribed by subdivision three of section 179, of the Code; (a replevin suit) and the Sheriff arrests him under such order, and allows him to go at large, on executing the proper bond, with sureties who fail to justify on being excepted to; and the plaintiff, in such action, recovers judgment for the value of the property, and damages for the detention thereof, with costs; he may maintain an action against such Sheriff, to recover the amount of said judgment, after an execution against the property of such defendant has been issued on said judgment and returned unsatisfied.
2. It is not essential to the right to maintain such an action, that an execution against the body of such defendant has been issued and returned unsatisfied, nor that a writ *de retorno habendo* has been issued and returned unsatisfied.
3. Such judgment, although it is not in the alternative form prescribed by section 277 of the Code, is not void, but is valid until reversed or amended.
4. The statute (Code, § 201,) which provides that, "if, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the Sheriff shall himself be liable as bail;" means that the liability of a Sheriff arresting a defendant, where bail does not justify, is the same as that of the bail in that particular case would have been, if they had justified on being excepted to.
5. When such bail, by the terms of their undertaking, become guarantors of the payment of any judgment that may be recovered, the Sheriff is made guarantor if he discharges the defendant on taking bail, who fail to justify.

(Before BOSWORTH, Ch. J., and HOFFMAN, J.)

Heard, January 10; decided, January 29, 1859.

THIS is a motion by the plaintiff for judgment on a verdict in his favor, taken subject to the opinion of the Court at General Term, on the questions of law arising at the trial.

In July, 1855, *Delachapelle* commenced an action in this Court against *Amos R. Thompson*, to recover the possession of personal property. The necessary papers, to entitle him to have the property taken and delivered to him, were placed in the hands of he defendant, to be executed, he being then Sheriff of the city and county of New York.

Not being able to find the property, an order was obtained in that action, on the 28th of July, 1855, under subdivision three, of section 179, of the Code, requiring Thompson to be arrested,

and held to bail in the sum of $800. The defendant, as such Sheriff, arrested Thompson by virtue of said order, and discharged him from custody, on his executing, with two sureties, an undertaking in the terms prescribed by section 211, of the Code. Such sureties were excepted to, but never justified. Thompson appeared by attorney in that action, but did not put in an answer.

Delachapelle recovered judgment in that action on the 24th of January, 1856, which judgment recites, that a Sheriff's jury had assessed the plaintiff's damages "at the sum of four hundred dollars, for the value of the property claimed by the plaintiff, and one hundred and fifty dollars for the detention thereof," and adjudges, "that Alfred Delachapelle, the plaintiff, recover of Amos R. Thompson, the defendant, the sum of $550, the amount claimed, with $33.87 costs and disbursements, amounting, in the whole, to $583.87."

An execution, against the property of Thompson, and conforming, in form, to the judgment, was issued on the judgment to the Sheriff, (James C. Willett being then Sheriff of the city and county of New York,) who returned it, and upon it, "no personal or real property."

Delachapelle, on the 26th of January, 1856, assigned to the present plaintiff "the said judgment, and all sum and sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon."

This action is brought, to recover of the defendant, as such Sheriff, by reason of the premises, the amount of such judgment. It was tried on the 15th of March, 1858, before Mr. Justice BOSWORTH, and a jury.

On the trial, the facts above were proved, and when the plaintiff rested, the defendant moved for a dismissal of the complaint, on the grounds: "1st. That the plaintiff had failed to show any right to recover any judgment against the defendant upon his alleged liability as bail. 2d. That no judgment, authorized by law, had been recovered in the case of *Delachapelle* v. *Thompson*. 3d. That there had been no judgment for a delivery of the property or any part thereof. 4th. That no execution, in the form prescribed by law, for a delivery of the property, had been issued or returned. The Court denied the motion. The defendant,

LUIGI GALLARATI v. JOHN ORSER, Sheriff.

1. When an order is duly made for the arrest of a defendant, in the case prescribed by subdivision three of section 179, of the Code; (a replevin suit) and the Sheriff arrests him under such order, and allows him to go at large, on executing the proper bond, with sureties who fail to justify on being excepted to; and the plaintiff, in such action, recovers judgment for the value of the property, and damages for the detention thereof, with costs; he may maintain an action against such Sheriff, to recover the amount of said judgment, after an execution against the property of such defendant has been issued on said judgment and returned unsatisfied.
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then and there, duly excepted to the said ruling and decision of the Court." The defendant then gave in evidence an order made by Chief Justice OAKLEY, dated October 2, 1855, (in the suit of *Delachapelle* v. *Thompson*,) obtained by Thompson, requiring Delachapelle to show cause on the 6th, why Thompson should not be allowed to serve an answer in that action, and also to give notice of the justification of sureties therein, and for other relief, and staying the proceedings on the part of the plaintiff and of the Sheriff, in the meantime, and until the decision of the Court thereon. He, also, proved that the hearing on said order, to show cause, was adjourned, by "consent," to the 10th, and then until the 17th, and then until the 23d, and then until the 24th, on which day an order was made by a Judge of the Court, allowing "Thompson five days to serve his answer and notice of justification, on payment of five dollars costs of motion."

The Court, against the objection, and an exception thereto by the defendant, allowed the plaintiff to give evidence tending to prove that Bensil, the Deputy Sheriff who arrested Thompson, by virtue of the order holding him to bail, consented to such adjournments before they were made, and that after the expiration of the five days named in the order of the 24th of October, 1855, Bensil was requested to re-arrest Thompson, because his bail had not justified. Bensil was examined, and denied that he was requested to re-arrest Thompson, or that he consented to such adjournments.

When the evidence was closed, the jury, under the direction of the Court, (as the case states,) found a verdict for the plaintiff for the sum of $666.47, "the amount of the judgment, being for $583.87; interest $80.60, subject to the opinion of the Court at General Term, with power to dismiss the complaint, or the Court at General Term to give such judgment, and for such amount as the Court may be advised. Case to be then made up as if such decision had been made at the trial term, and such exceptions then taken thereto, as either party may be advised to take, and shall within ten days after notice of decision, be served on the opposite party—both parties agreeing to this disposition of the case."

Some further facts, which need not be here repeated, are stated in the opinion of the Court.

F. H. B. Bryan, for plaintiff, in moving for judgment on the verdict, made and argued the following points:

1. The undertaking prescribed by section 211 must be strictly complied with. The execution of the undertaking fixes the character of the parties as bail. (7 How. Pr. R., 214.) The sureties on such undertaking cannot exonerate themselves by surrendering the defendant. (*Vide* § 188, subd. 2.)

§ 201. Fixes the liability of the Sheriff, if among other things bail be not justified. He can only exonerate himself by the giving and justification of bail as provided by sections 193, 194, 195, and 196.

The undertaking exacted by section 211, renders the sureties responsible for the return of the property, if the return be adjudged, *and for the payment of such sums of money as may for any cause whatever*, be recovered against the defendant.

The condition is broad. The Sheriff became liable to perform the condition, and to satisfy the judgment recovered against the defendant Thompson.

II. Judgment was recovered against Thompson, January 24, 1856, for the sum of $583.87.

§ 261 of the Code, enacts that when the property has not been delivered to the plaintiff, the jury shall assess the value of the property, &c., and the damages, if claimed in the complaint.

The verdict of the jury in this case is proper. It is a general verdict. It assesses the value of the property at $400. The damages of detention at $150. (*Archer* v. *Boudinot*, 1 Code R., N. S., 372; *Commercial Bank* v. *White*, 3 How., 292.)

It was unnecessary for the verdict to find that the plaintiff was entitled to a return of the property. There was no answer. The facts alleged in the sworn complaint are admitted.

The omission to find the plaintiff entitled to a return of the property, is, at best, a mere irregularity, *of which the defendant in the action could alone avail himself*. It is strictly a question between the plaintiff and the defendant in the action.

It is not availing to the defendant here who is not a party in interest. (7 How., 449, 457; 1 Cow., R., 309; 4 id., 158; 8 id., 192.)

As between the plaintiff and defendant, this was an amendable defect. (7 Cow., 29.)

It is an error or defect not affecting the substantial rights of parties. It will not affect the judgment. (§ 176, Code.)

It is strictly technical. (4 Comst., 276.)

III. The execution followed the judgment. The form of the execution prescribed by subdivision 4, section 289 is merely directory.

The omission of a direction in the execution to take the property could not injure the Sheriff. He had already returned that the property could not be found.

In any event, this is a mere irregularity of which the Sheriff cannot avail himself. The execution would be good until set aside. The Sheriff is neither party nor privy to it, and cannot make the objection. It cannot be examined in a collateral action. (*Jones* v. *Cook*, 1 Cow., 309; *Bissel* v. *Kipp*, 5 Johns., 100.)

But it is contended that the prevailing party has a right to elect whether he will take the property or the value as assessed. In the majority of cases, to force the party to take back the property, which might be materially deteriorated, would be a grievance.

IV. The adjournments of the order to show cause could not in anywise increase the liability of the Sheriff, or change his position on an undertaking given under section 211 of the Code.

The complaint avers, that notice to the Sheriff of refusal to accept the sureties was served August 8, 1856. This fact is not denied in the answer.

The order to show cause on which the adjournments were made, is dated October 2, 1856. The Sheriff, before the order was granted, was fixed as bail. Neither the order nor the adjournments could increase his liability.

The Sheriff could only have exonerated himself by putting in and justifying bail, on the undertaking prescribed by section 211 of the Code. Section 201 provides for his discharge from liability pursuant to sections 193, 194, 195 and 196.

The current of authorities as to the discharge of bail by indulgence of the principal, only extends to cases where the situation of the bail is materially changed, or his *risk increased.* (10 Johns. 505; id., 587; 6 Wend., 244, 245. Gr. Pr., 2d. ed., 443.)

If the judgment or the execution were in any wise irregular,

the Sheriff could alone have availed himself of such irregularity, by applying to set aside the judgment against the principal, as well as the proceedings against himself. (4 East R., 308.)

He cannot in this action set up the irregularity as a defense.

A. J. Vanderpoel for the defendants.

I. The complaint does not contain facts entitling the plaintiff to maintain an action on the Sheriff's liability as bail.

1. It is not alleged that an execution had been issued against the person of Thompson.

This defect is not supplied by the evidence. Thompson has always been within the bailiwick of the Sheriff, and could have been arrested, at any time, under a proper execution.

As to the sufficiency of the pleadings under the Code. (*McKyring* v. *Bull*, 2 Smith, 297.)

2. The liability of the Sheriff *is not fixed*, and an action cannot be maintained against him until he is unable to, and fails to, secure the person of the debtor on a proper execution. (*Pearsall* v. *Lawrence*, 2 Johns., 514; *Shiland* v. *Cory*, 2 Wend., 246.)

3. The order, in all cases, commands the Sheriff to arrest the defendant, and hold him to bail in the specified sum. The undertaking of the bail varies according to the nature of the action; but if the defendant does not give the bail, then the Sheriff must produce the body when execution issues. To this end, the law has furnished to the Sheriff the means of control of *the person.*

4. The two hundred and first section of the Code, declaring the Sheriff's liability as bail, was not intended to render him liable according to the condition prescribed in section two hundred and eleven, *so long as he can produce the body* when required. It *provides that* he shall be liable, in the same manner where "*bail be not given*" as where bail fail to justify. The plaintiff, to recover, must establish the proposition, that when the Sheriff obeys the order, by *arresting the party, and retains him in custody pending the action, the plaintiff can, while the defendant is thus imprisoned, sue the Sheriff, and recover from him the delivery of the property, or its value*, and all such sums as may be recovered against the defendant.

5. The last clause of section two hundred and one declares that the Sheriff may relieve himself from liability, by giving and

justifying bail, *for the custody of the person* of the defendant, at any time before process against the person is issued to enforce the judgment, establishing most conclusively (if this section is at all applicable to the action for claim and delivery) that the Sheriff's liability depends upon his being able to produce the person of the defendant on execution.

II. The action cannot be maintained against the defendant, on his alleged liability as bail, until a judgment for a return of the property has been recovered in the suit of *Delachapelle* v. *Thompson*. The bail are only liable in the case of a judgment for return; this is their undertaking; *they are sureties;* nothing else can, so to speak, liquidate their liability. (Code, § 211.) The judgment for the value of the property was wholly unauthorized by the Code. The plaintiff can only take judgment for a return of the property, and damages for detention, where a return is awarded. (Code, § 277; *Dwight* v. *Enos*, 5 Seld., 475; *Fitzhugh* v. *Wiman*, id., 659; *vide*, *Slack* v. *Heath*, 1 Abb., 331.)

III. But if there was a judgment for return, the plaintiff must go further, and show that he has issued an execution in conformity with such judgment, before he can charge bail. It was of no avail that the plaintiff issued an execution against the property of the defendant; under the first subdivision of section two hundred and eighty-nine, such an execution was void. The kind and form of execution, in the action for claim and delivery, is prescribed in section two hundred and eighty-six, and subdivision four of section two hundred and eighty-nine. The liability of the bail could not be fixed until the issuing and return of the proper execution; as in similar cases before the Code, the condition of the undertaking was not broken until the return of the execution.

1. In most cases the property will be obtained whenever judgment therefor is recovered, and an execution issued which will authorize the Sheriff to take it.

2. Under the former practice, it was necessary that a *ca. sa.* be sued out against the principal, and actually returned *non est inventus*, and filed, before the plaintiff could proceed to charge the bail. (*Pearsall* v. *Lawrence*, 3 Johns., 514; *Shiland* v. *Cory*, 2 Wend., 246; *Rathbone* v. *Blatchford*, 1 Caines, 588, 592; *Cowden* v. *Pease*, 10 Wend., 333, 335.)

3. The R. S. required the plaintiff in replevin to give a bond at the commencement of the action, with a condition substantially like the undertaking of bail in claim and delivery under the Code. In an action upon such a bond, it was necessary *to prove* the issuing and return of a writ *de retorno habendo.* (*Cowden* v. *Pease*, 10 Wend., 333; *Cowden* v. *Stanton*, 12 id., 120; *Gibbs* v. *Bull*, 18 Johns., 435, 440.)

IV. If the Sheriff became liable as bail, he is entitled to all the rights and protection of a surety, and, therefore, was discharged by the delays which were consented to by the plaintiff. (*Heck* v. *Heath*, 1 Abb., 331.)

V. The alleged cause of action against the Sheriff did not pass to the plaintiff under the assignment of the judgment. (*Commonwealth* v. *Furqua*, 3 Litt., 41; *Jones* v. *Commonwealth*, 2 id., 357.)

The defendant is entitled to judgment.

BY THE COURT—BOSWORTH, Ch. J. The judgment in the action of *Delachapelle* v. *Thompson*, should have been in form; that the plaintiff recover the possession of the property; or the value thereof as assessed, *in case a delivery cannot be had;* and the damages assessed for the detention thereof, and the costs as adjusted. (*Fitzhugh* v. *Wiman*, 5 Seld., 559–562; *Dwight* v. *Enos*, id., 475.)

But though not entered in the alternative form, it is not *void;* it is erroneous merely.

It was entered on the 24th of January, 1856. This action was commenced on the 28th of April, 1856, and the complaint informed the defendant, in what form the judgment had been entered. His answer was verified on the 11th of August, 1856, and it alleges, "that the judgment mentioned in said complaint, as having been recovered in said action, is wholly void and of no effect."

The judgment could not be set aside on *motion* for *irregularity*, unless such motion was made within a year after judgment rendered. (2 R. S., 359, § 2; Code, §§ 174, 173.)

More than a year had elapsed between the entry of such judgment and the trial of the present action. The right of the defendant, Thompson, to appeal had elapsed, if notice of the judgment was served at or near the time it was rendered. Neither Thomp-

son nor the Sheriff could have moved, at the time the trial of this action was commenced, (more than a year having elapsed since said judgment was rendered,) to set it aside, as irregular, on *motion*. It is clearly regular and valid, so far as it relates to the damages assessed for the detention of the property, and the costs of the action. It was erroneous in form, in not adjudging a return of the property, and a recovery of its value *only in case* a delivery of the property could not be had.

The execution issued, followed and conformed to the judgment. That, therefore, was regular, assuming the judgment to be valid, until reversed or modified. The Sheriff having discharged Thompson from custody, on taking bail, who failed to justify, the question is, what is the nature and extent of the Sheriff's liability?

The concluding sentences of section 187 prescribe the terms of the undertaking which it was the duty of the Sheriff to exact, and section 201, his liability, in case he takes bail who do not justify.

By declaring that "the Sheriff shall himself be liable as bail," section 201 must mean, that if the order to arrest and hold to bail makes it his duty to take such bail as is prescribed, when the arrest is made under subdivision 3 of section 179, his liability will be the same as that of such bail would be. His liability is the same as that of *such bail* would be (if they had justified), and if a judgment, in such form, had been subsequently entered, as has been actually entered in that cause. Such bail cannot exonerate themselves, by a surrender of their principal. (§ 188, and §§ 187 and 211.)

In cases of an arrest of a defendant, by a Sheriff, by virtue of an order granted under the other subdivisions of section 179 of the Code, the liability of the Sheriff, in case he allows a defendant to go at large, on his giving an undertaking, with sureties, who fail to justify, is the same, as that of such sureties would have been had they justified.

The undertaking, which it was the duty of the Sheriff to take, in the case before us, and the one which he did in fact take, is to the effect, that the persons, executing it "become bound to the plaintiff in the sum of $800, for the delivery of said property to the plaintiff if such delivery shall be adjudged, and for the pay-

ment to him of such sum or sums of money as may, *for any cause*, be recovered against the defendant in this action."

The plaintiff in that action, recovered against the defendant therein, a judgment for the sum of $666.47, which is wholy unpaid.

Chapter 2 of title 7 of the Code does not declare when, or on what contingencies, an action may be brought on an undertaking, given under that chapter. (§§ 206–217, inclusive.)

Section 471 of the Code, declares that "the second part of this act" (the Code), "shall not affect" "any éxisting statutory provisions relating to actions, not inconsistent with this act, and in substance applicable to the actions hereby provided."

By 2 Revised Statutes, 523, section 7, subdivision 2, the Sheriff was required to take from a plaintiff in the action of replevin (for which a "claim and delivery of personal property," chap. 2, title 7, of the Code is a substitute,) a bond with a condition, in terms, substantially like that of the undertaking required, when a defendant is arrested and held to bail under subdivision 3 of section 179 of the Code. (See §§ 187 and 211 of the Code.)

Section 64, of 2 Revised Statutes, 533, (and *Cowden* v. *Pease*, 10 Wend., 333, and *Cowdin* v. *Stanton*, 12 Wend., 120, decided under it,) are cited, as establishing the proposition, that no action will lie against the sureties to a bond executed under subdivision 2 of section 7 of 2 Revised Statutes, 523, until a writ *de retorno habendo*, had been issued and returned unsatisfied.

Section 64 of 2 Revised Statutes, section 533, provides that, "if any writ of return, *or other execution*, issued in favor of the defendant in the action, shall be returned unsatisfied, in whole or in part, such defendant, or his representatives, may have an action upon the bond executed by the plaintiff and his sureties to recover the value of the property replevied, and the moneys, damages and costs awarded to such defendants, as the case may be, and such bond may be assigned to such defendant, or his representatives, on their request."

Cowden v. *Pease*, (10 Wend., 333,) came before the Court, on demurrer, and the Court *held*, that it was not necessary to aver in the declaration that an execution had been issued, but that such fact must be proved at the trial.

Cowdin v. *Stanton*, (12 Wend., 120,) came before the Court, on a motion by the defendant for a new trial. SAVAGE, Ch. J., said: "It has been held, in *Cowdin* v. *Pease*, (10 Wend., 333,) in an action on this same bond, that the suit cannot be commenced on the bond until the return of *the execution* unsatisfied, in whole or in part; but that is matter of proof, and need not be averred in the declaration. No proof of that kind was offered on the trial." (Id., p. 122.) In that case, no execution, of any kind, had been issued. In that case, it is true, Chief Justice SAVAGE states, that it was admitted by the pleadings, "that the goods and chattels had not been returned, but were converted and disposed of by the Steam Navigation Company," (the plaintiff in the replevin suit;) "but it does not necessarily follow that they would not have been surrendered up to the officer upon a writ of *retorno habendo*. By the decision last cited, and the Revised Statutes, no action lies until such writ shall have been returned unsatisfied, in whole or in part." (12 Wend., 122.) These observations may be conceded to be accurate, when made of a judgment, which, by its terms, awards a *return* of the property, and should probably, be understood as having been spoken with reference to a judgment in that form. The declaration in each of those cases, (as reported in the 10th and 12th of Wend., *supra*,) states that such was the form of the judgment rendered.

But section 64 of 2 Revised Statutes, page 553, (above quoted,) declares that "if any writ of return, *or other execution*, issued," &c., "shall be returned unsatisfied, in whole or in part," an action may be brought upon the bond. Under the Revised Statutes, a defendant in replevin might, in many cases, waive a return, and take judgment for the value of the property. (2 R. S., 531, §§ 53, 54, 55.) When judgment was taken for the value only, and for damages for the detention of the property, no *retorno habendo* would issue, but an execution against property would be issued. When that was returned unsatisfied, in whole or in part; by section 64, (2 R. S., 533,) the defendant might bring a suit on the replevin bond given by the plaintiff and his sureties.

In the case before us, the judgment rendered is for the recovery of money only. When a judgment merely requires the payment of money, an execution "against the property of the judgment debtor," is the appropriate and prescribed form. (Code, §§ 285,

286, and sub. 1 of § 289.) When the judgment requires the delivery of personal property, the execution, among other things, must direct "the officer to deliver the possession of the same," &c. (Id., §§ 285, 286, and sub. 4 of § 289.)

In the case before us, the judgment requires the payment of money, and nothing else. An execution, in the form prescribed for such a judgment, has been issued and returned wholly unsatisfied. By section 64, (2 R. S., 533,) if that statute is applicable to these proceedings, an action might, thereupon, be brought against the parties executing the undertaking received by the Sheriff, if they had justified. By the terms of that undertaking, they agreed to be liable "for the payment," (to Delachapelle,) "of such sum or sums of money as may, *for any cause*, be recovered against the defendant in" (that) "action." In that action, by the judgment rendered in it, he recovered against the defendant therein the sum of $666.47. If that judgment is valid, and if its regularity cannot be impeached or inquired into collaterally, it is evident that such sureties, had they justified, would be liable, in an action against them, for that sum.

The Sheriff being liable as bail, and in the case before us being liable as *such bail*, the plaintiff, as the assignee of Delachapelle, is entitled to judgment on his verdict, if the judgment rendered is valid, until amended or reversed.

I think it needs no citation of authorities to show that it is not void, and that its regularity cannot be called in question collaterally. (*Croghan* v. *Livingston*, 17 N. Y. R., 218, 221–223.)

It was not necessary that an execution against the *person* of Thompson should have been issued and returned, before the right to bring this action would accrue. That is necessary only when an arrest has been ordered and made under the subdivisions of section 179, other than subdivision 3. In all cases except the one last named, the bail are discharged if the defendant is found and arrested on an execution against his body. He may surrender himself to the Sheriff of the county in which he was arrested, or be surrendered by his bail, in exoneration of their liability. (Code, §§ 188, 191.)

But bail for a party arrested under subdivision 3 of section 179, are precluded from discharging their liability, by a surrender of their principal. (§ 188, sub. 2.) They become, by the

terms of their undertaking, sureties for the *actual payment* of any sum that may be recovered against their principal. (§§ 187, 211.) In arrests for other causes, their undertaking is, simply, that their principal "shall, at all times, render himself amenable to the process of the Court, during the pendency of the action, and to such as may be issued to enforce the judgment therein." (§ 287.)

The consents given by the attorney of Delachapelle, that the hearing of the order to show cause, made on the 2d of October, 1855, be adjourned from time to time, from the 6th to the 24th of October, do not affect the Sheriff's liability. They neither increased nor affected his risk. Had the order made on the 24th of October, 1855, been complied with, and sureties been given, who justified, the Sheriff would have been relieved from liability.

Whether the deputy did or did not consent to such adjournments, was wholly immaterial. And whether the Sheriff or his deputy could or could not have subsequently arrested Thompson, and omitted to do so, is of no consequence, if the views already expressed are correct.

The assignment executed by Delachepelle to the plaintiff, transferred the cause of action for which this suit is brought. (*Bowdoin* v. *Colman*, 6 Duer, 182.)

The plaintiff must have judgment on the verdict. On making up the case, under the stipulation made at the trial, the evidence as to the consent of Bensel to the adjournments of the hearing upon the order to show cause, and as to his having been requested to rearrest Thompson, after the 29th of October, 1855, should be omitted, as it is disregarded by the Court, at General Term, in forming the conclusions above expressed.

Judgment for plaintiff on the verdict.

RENARD and Co., Plaintiffs and Appellants, v. TULLER, HART and McCORKLE, Respondents.

Where a written agreement, dated January 6, 1857, was signed by some, but not by all the creditors of the firm of T., H. & McC., which declared that "we, the undersigned creditors of the firm of T., H. & McC., in consideration of one dollar to each of us paid, agree to accept the sum of sixty cents on the dollar, in their notes at six, nine and twelve months, from the 1st of February, 1857, without interest, in full settlement of our respective claims against said T., H. & McC.; all claims to be put on the same basis and considered as due 1st February, 1857, by allowing or deducting interest; and the original notes are to be held as collateral until the notes given in compromise are paid," it was *held*:

1. That such agreement was, in effect, a contract of the creditors signing it with each other, as well as between them severally and their common debtor.
2. That it was obligatory on those signing it, though not signed by all the creditors, and although some who did not sign it, had been paid sixty per cent cash; and others whose claims were very small in amount, had been paid a larger per centage.
3. That the agreement of the several signing creditors to relinquish a part of their demands, was a sufficient consideration for the promise of each, to accept a part in satisfaction of his whole debt.
4. That a tender of notes of such firm, dated January 1, 1857, for proper amounts, at seven, ten, and thirteen months, from that date, was a performance by such firm of the agreement, on their part, to give notes at six, nine, and twelve months, from the 1st of February, 1857.
5. That the fact, that one of such firm expected that the firm would make $10,000 by the compromise, and so declared, was immaterial, and did not affect its validity; there having been no misrepresentation or concealment by the firm of any material fact, to induce the signing of such agreement

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, January 11; decided, January 29, 1859.

THIS is an appeal by the plaintiffs, from an order of the 1st of June, 1858, denying a motion made by them for a new trial; and also from a judgment entered on the 2d of June, 1858, in favor of the defendants, Hart & McCorkle, for the sum of $111.31, their costs of the action; and from a judgment, entered the same day, in favor of the defendant Tuller, for the sum of $108.05—his costs of the action.

The action was to recover the amount of several promissory notes, made by the defendants, and delivered to the plaintiffs.

The defendant Tuller, appeared by P. G. Clark, and put in a separate answer; and the defendants Hart and McCorkle, appeared by D. D. Lord, and put in an answer. The defendants, in their answers, admitted the making of the notes, and their delivery, and set up by of way defense; a composition agreement, and performance of it, on their part. The composition agreement is as follows, viz.:

"We, the undersigned creditors of the firm of Tuller, Hart & McCorkle, in consideration of the sum of one dollar, to each of us paid, agree to accept the sum of sixty cents on the dollar, in their notes at six, nine, and twelve months, from the 1st of February, 1857, without interest, in full settlement of our respective claims, against said Tuller, Hart & McCorkle."

"All claims to be put on the same basis, and considered as due February 1, 1857, by allowing or deducting interest; and the original notes are to be held as collateral, until the notes given in compromise are paid.

"NEW YORK, 6th January, 1857."

It was proved, at the trial, that creditors to the amount of about $87,000, signed this, and a duplicate instrument in the same terms. Creditors to about $29,000 signed that which the plaintiffs signed, prior to their signature. Their demand was $16,335.07. And creditors to about $24,000, in amount, signed the same paper subsequently. The liabilities of the firm were about $225,000. Their assets were valued at about $189,000, by themselves; and at about $164,000, by the creditors.

A number of creditors, who did not sign the agreement, were subsequently settled with; some at under sixty cents on the dollar, for cash; some for sixty cents cash, less interest; some small amounts, not exceeding $300, were paid in full. Some other creditors remain, who have neither signed, nor been settled with in any way, especially E. D. Morgan, to the amount of $28,000, and Earle, Porter & Co., to the amouut of about $5,000.

On the 29th of January, 1857, the defendants tendered, as performance, on their part, of the composition agreement, three notes to the plaintiffs, all dated January 1, 1857; one at thirteen

months, for $3,226.14; one at ten months, for $3,226; and one at seven months, for $3,225. The plaintiffs refused to accept of the notes. Some evidence was given, tending to prove that, if all the creditors of the defendants (except those whose demands were regarded as confidential) had accepted sixty per cent in compromise, there might have remained, to the defendants, a surplus estimated at not exceeding $10,000. And, also, that one of the defendants believed his interest in the assets of the firm to be worth $10,000.

The cause was tried before Mr. Justice WOODRUFF, and a jury, in May, 1858. When the parties had rested, the Judge stated that he did not perceive that there was any disputed question of fact to be submitted to the jury. The counsel of the plaintiffs requested the Court to submit to the jury, as a question of fact, whether the defendant William G. Tuller, did or did not intend to make $10,000 by the compromise with his creditors; and if so, that that was a fraud upon the plaintiffs.

The Court refused to submit this question to the jury, and the plaintiffs duly excepted.

The Judge charged the jury that the compromise agreement constituted a defense; to which the plaintiffs excepted.

The Court directed the jury to find a verdict for the defendants, which was done accordingly.

A motion was made at Special Term for a new trial upon a case and exceptions, and denied by order of the 1st of June, 1858.

Judgments for the costs were entered on the 2d of June, 1858, as before stated. From such judgments, and from the order, denying a new trial, the plaintiffs appealed to the General Term.

C. Bainbridge Smith, for appellants (the plaintiffs).

I. The agreement on the part of the plaintiffs to accept, without accepting sixty per cent of their claim in notes of the defendants, at nine, twelve and fifteen months, is without consideration, and not binding upon the plaintiffs. (*Heathcote* v. *Crookshanks*, 2 T. R., 24; *Greenwood* v. *Lidbetter*, 12 Price R., 183; *Lynn* v. *Bruce*, 2 H. Bl., 317; *Lowe* v. *Eginton*, 7 Price, 604; *Fitch* v. *Sutton*, 5 East. R., 228; *Thomas* v. *Courtnay*, 1 Barn. & Ald., 1; *Fellows* v. *Stevens*, 24 Wend. R., 294, 302; *Acker* v.

Phœnix, 4 Paige R., 305; *Breck* v. *Cole*, 4 Sandf. S. C. R., 79; *Dolsen* v. *Arnold*, 10 How. Pr. R., 580.)

1. The agreement is not under seal. (*Acker* v. *Phœnix*, 4 Paige R., 305.)

2. *All* the creditors did not execute it. (*Boothbey* v. *Sowden*, 3 Camp., 175.)

In this case there was an agreement for an extension of payment merely, and the Court held there was sufficient consideration for each of the creditors that it was subscribed by *all* the others.

(1.) Such agreements stand upon a different footing than composition *deeds*, and are looked upon with more favor. (3 Chitty's Com. Law.)

(2.) In *Norman* v. *Thompson*, 4 Exchequer, 755, (Welsby, Hurlstone & Gordon,) the Court said: "The only question here is whether there is a variance between the agreement as stated in the special verdict, and the averment of it in the plea." The plea stated that the defendant agreed with the plaintiff and divers other creditors, and the plaintiff and the said last mentioned creditors then mutually agreed with each other to accept ten shillings in the pound as a composition upon and in full satisfaction and discharge of their demands, and it was found by the special verdict that such agreement was made, and that all the creditors except three, then agreed with each other to accept said compromise. The Court held that there was no variance between the plea and the facts found by the special verdict, and an agreement by each individual to give up part of his claim is a sufficient consideration.

(3.) The case at bar is distinguishable from that of *Norman* v. *Thompson* in this respect: (1.) It involves the validity of the composition agreement, and not the construction of the plea; and (2) the creditors in this case did not agree *with each other* to give up part of their claim, and, consequently, lacks the essential ingredient of that case. (See *Brown* v. *Dakeyne*, 11 Jur., 39; *Reay* v. *Richardson*, 2 Cr. M. & R., 422.)

(4.) No case in the books can be produced (except *Norman* v. *Thompson*, if it decide otherwise) where an executory agreement such as the one in question has been held to bind the creditors who signed it. It is mere *nudum pactum*. And those cases in which it has been held that it was not essential to the validity

of the agreement, that *all* should enter into it to render it binding on those who executed it, are cases where the agreement was *under seal*, or where a *higher security* was given, and which agreement of itself, independent of its being a composition, was a sufficient accord and satisfaction. Such were

Bradley v. *Gregory*, (2 Camp., 383,) which is said by the Court in 24 Wend., 302, to be the *strongest* case, and there a higher security was given.

Wood v. *Roberts*, (2 Starkie R., 417,) which Lord ABINGER said, (in *Reay* v. *Richardson*, 2 Cr. M. & R., 428,) "must have been decided on the particular facts of the case," and there also a higher security was given.

Good v. *Cheeseman*, (2 Barn. and Adol., 328; id., 22 E. C. L. R., 89,) was an extension agreement, signed by some of the defendant's creditors. The debtor covenanted to pay two-thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as collateral security. *Held a defense to the action.*

(5.) On the other hand, all the authorities concur in the proposition that the agreement in question is not binding. (The counsel commented on *Acker* v. *Phœnix*, 4 Paige, 305; *Heathcote* v. *Crookshanks*, 2 J. R., 24; *Greenwood* v. *Lidbetter*, 12 Price, 183; *Lynn* v. *Bruce*, 2d H. Black., 317; *Lowe* v. *Eginton*, 7 Price, 604; *Fitch* v. *Sutton*, 5 East. R., 230; *Thomas* v. *Courtnay*, 1 B. and Ad., 1.)

3. There is no pretense that any creditor was lured to accept the composition by any act of the plaintiffs; if such had been the case, it should have been pleaded; such an act would have been a fraud, and fraud cannot be presumed; and where it is stated that if any creditor has induced any other creditor to compound with the debtor, the creditor luring the other will be bound by the compromise, applies only to those cases where the creditor has parted with his debt, so that he could have no recourse upon his original demand. Such is not the case at bar, even if the plaintiffs induced all the other creditors to sign it. The authorities from which this principle is cited in the elementary works, and referred to in the books, in which it was not necessary to the decision of the cases, do not carry out that principle to the extent in which it is generally stated. (*Greenwood* v. *Lidbetter*, 12 Price,

183; *Bradley* v. *Gregory*, 2 Camp., 383; *Wood* v. *Robert*, 2 Stark, 416; *Hawley* v. *Foote*, 19 Wend., 516.)

II. The defendants failed to perform the agreement on their part. The compromise notes, according to the agreement, were to bear date on the first of February, 1857; those tendered, bore date on the first of January, and had *seven*, *ten*, and *thirteen* months to run, instead of *six*, *nine*, and *twelve*, as called for by the composition agreement. It also appears that the plaintiffs' claim amounts to but the sum of $7,236.56, while the compromise notes that were tendered amounted to the sum of $9,677.14.

1. All the cases hold that if the terms of the composition agreement *be not exactly followed* by the debtor, the creditor is remitted to his original rights; and the *onus* is with the debtor to prove such performance. (*Fellows* v. *Stevens*, 24 Wend. R., 302; *Dolsen* v. *Arnold*, 10 How. Pr., 530; *Oughton* v. *Trotter*, 2 Nev. & M., 71; *Cranley* v. *Hillary*, 2 M. & S., 120; *Rosling* v. *Muggeridge*, 16 M. & W., 181.)

2. Where it is necessary for a party to plead, or aver performance or a tender thereof, an exact performance must be stated. (1 Chitty on Pleading, 325; *Spencer* v. *Tilden*, 5 Cow. R., 144; *Oakey* v. *Morton*, 1 Kern., 25.)

3. The compromise notes, if accepted by the plaintiffs, according to the testimony in the case, would have been fraudulent and void. (*Breck* v. *Cole*, 4 Sandf. S.C. R., 79).

III. The agreement, if otherwise valid, has become inoperative upon the plaintiffs by reason of the defendants' having paid some of their *creditors in cash as much as the defendants were to receive in notes.*

1. It was necessary that all the creditors should sign the agreement. It is headed, "We, the undersigned, creditors," which means ALL, and not a PORTION of them; and only $69,000 out of $225,000 would execute the agreement. It also provides that *all claims shall be put upon the same basis.*

2. The payment by the defendants to some of their creditors in cash, although those creditors never acceded to the arrangement, or executed the agreement, was a fraud upon the plaintiffs and the other creditors who did sign; a composition agreement is, in its spirit, if not in its terms, an agreement that all the creditors shall stand in the same situation; and where the debtor

allows any creditor to obtain an advantage over the others, or pays one in preference to another, such an act is a fraud upon the other creditors, and renders the whole agreement inoperative and void. (*Spooner* v. *Whiston*, 8 J. B. Moore, 580; *Id.*, 17 E. C. L. R., 112; *Leicester* v. *Rose*, 4 East. R., 372; *Breck* v. *Cole*, 4 Sand. S. C. R., 79—and cases cited.) The judgment should be reversed, and a new trial granted.

Daniel D. Lord for the respondents, Hart & McCorkle.

I. There was no error in refusing, to submit to the jury whether William G. Tuller did or did not intend to make $10,000 by the compromise, and to charge that it was a fraud upon the plaintiffs.

1. There was not evidence enough to sustain this fact if the jury had so found it.

The only evidence to the point, is in Tuller's deposition. He states that at the time of the settlement he believed his interest to be worth $10,000; but this is on the supposition that all the creditors not confidential, would accept the terms.

2. Even if the evidence proved it, an intention, much less a mere expectation of saving $10,000, is not necessarily or legally a fraud.

(*a.*) It does not appear that any misrepresentation or concealment existed, as to assets or liabilities.

(*b.*) The expectation may have arisen, and in fact, as appears by the testimony, did arise from an expectation of realizing by good management, more than the balance of the assets.

II. There was no error in charging that the compromise agreement constituted a good defense.

1. It was an agreement signed by plaintiffs and several others, creditors of defendants, releasing them on receiving sixty per cent in notes. It must be held a valid release, unless the plaintiffs show some fatal defect in it. The plaintiffs claim that it is invalid for want of consideration, want of seal, omission of some creditors; none of these objections are sufficient.

2. There was a valid consideration; the agreement by each creditor being consideration enough to support the agreement by the others. (*Norman* v. *Thompson*, 4 Exch., 759.) Held that an

agreement to release, made by a portion of the creditors, is binding.

POLLOCK, C. B. "It is a good consideration for one to give up part of his claim that another should do so, this appears not to need an authority." (*Boothbey* v. *Sowden*, 3 Camp., 174; *Bradley* v. *Gregory*, 2 id., 383.) Oral promise to accept a compromise held valid. (*Steinman* v. *Magnus*, 2 Camp., 124.) Composition not under seal, held valid. (*Cranley* v *Hillary*, 2 M. & S., 120.)

Composition not under seal, admitted to be valid, but creditor allowed judgment, because defendant did not tender the compromise notes.

These cases are approved in *Fellows* v. *Stevens*, (24 Wend., 298, 296.)

The following cases which may perhaps be cited against the principle of the above decisions, will be found on examination not to contradict it.

Heathcote v. *Crookshank* (2 T. R., 24.) Demurrer to a plea setting up a composition by way of defense. The judges decided against the composition on the ground, that it was an accord without satisfaction. It was not expressly pleaded that plaintiff's agreement to accept it was in consideration of all the creditors coming in. BULLER, J., admitted, that if the latter had been averred, the accord and tender might have been a bar, (see *Fellows* v. *Stevens*, 24 Wend., 299,) but this decision is overruled by the subsequent decision of *Norman* v. *Thompson*, above cited.

Fitch v. *Sutton* (5 East. R., 228.) The composition in this case was a mere accord not supported by the mutual consideration arising from agreements by several creditors.

Fellows v. *Stevens* (24 Wend., 294.) Decides only that an accord without satisfaction is invalid, it admits that an oral composition would be valid. (297.)

In this case plaintiffs recovered because defendant had expressly released him from the composition.

Acker v. *Phenix* (4 Paige 305.) The composition was by deed, but contained a proviso that it should not be binding, unless each and every creditor united in it.

Some creditors did not unite in it, and the debtor endeavored to show a parol agreement that some might be left out. Held that the written agreement could not be varied by parol. What

was said by the Chancellor about the necessity of a seal, did not arise in the case, no objection of that sort being made to the composition.

Greenwood v. *Lidbetter* (12 Price, 183.) In this case the plaintiff had not signed any composition agreement.

Thomas v. *Courtnay* (1 B. & A., 1.) Only question was upon the construction of the agreement which was held valid though not under seal.

Lowe v. *Eginton* (7 Price 604.) Seal required to this composition because deed to be released was a specialty.

Cockshott v. *Bennett* (2 T. R. 763.) Does not decide a composition not under seal to be invalid.

Dolsen v. *Arnold* (10 How. Pr. R., 528.) Not a question of composition but of accord and satisfaction.

Brown v. *Dakeyne* (11 Jurist., 39.) The bearing of this case is defined in *Norman* v. *Thompson* (4 Exch., 759,) viz., that when it is *averred* in a plea that *all* the creditors united in a composition, it is not enough *to prove* that *only some* did so, that if the averment had been that some other creditors united, it would have been a valid composition, and the proof would have supported it.

Reay v. *Richardson* (2 Cr. M. & R.) Case of accord not composition.

3. The consideration being sufficient there was no need of a seal, nor for the execution by all the creditors, unless such provision was expressed. (*Constantine* v. *Blache*, 1 Cox., 287.)

IV. The subscription by the plaintiffs was an inducement to others to subscribe.

The French and Swiss firms signed the same paper, but not until after plaintiff's signature.

V. The notes tendered were a sufficient compliance with the agreement.

The notes matured on the day specified in the agreement, if there were any objection to the form of the notes, it should have been mentioned at the time when they were tendered.

VI. There has been no infringement by defendants of any of the provisions of the composition.

"All claims to be on same basis," relates only to the time of maturity of claims of those signing the agreement as shown by the words "And considered as due 1st February, 1857, by allowing or deducting interest."

VII. It is not shown as a fact that any claims were settled at more than sixty per cent, except one claim collected by attachment which defendants could not prevent.

P. G. Clark, for respondent; Tuller.

HOFFMAN, J. I do not think that there is anything in the composition agreement to warrant the position of the plaintiffs' counsel, that the agreement was to be inoperative unless all the creditors signed it. Such a condition ought to be expressly declared, or clearly deducible from unambiguous language. Compositions could rarely be carried into effect if such stipulation is, in every case, or in every doubtful case to be implied, when the contrary is not declared.

The phrase is neither *all the creditors*, nor even *the creditors*, but merely "creditors." The clause, "all claims to be put on the same basis," is as applicable to the claims of all who shall sign, as to the claims of all who may be creditors.

Late English authorities have fully settled that a composition agreement, made between a debtor and a portion of his creditors, is valid and binding. The consideration of the relinquishment of a part of their claim by the others, is sufficient to make the promise and discharge of each obligatory. (*Norman* v. *Thompson*, 4 Exch. R., 755 [1850]; *Good* v. *Cheeseman*, 2 Barn. & Adol., 328 [1831]; *Boyd* v. *Hind*, 40 Eng. L. and Eq. R., 428 [1857].)

WILLIAMS, J., in delivering the opinion of the Court in *Boyd* v. *Hind*, says: "The law with respect to defenses founded on compositions between a debtor and his creditors, appears not to have been distinctly defined until the case of *Good* v. *Cheeseman*. It used to be sometimes laid down that a right of action once vested, could only be divested by a release or by accord and satisfaction; but since the decision of that case, the law has been considered as settled, that a composition agreement by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, would be a good answer to an action by the creditor for the original debt, if he accepted the new agreement in satisfaction thereof; and that for such an agreement there is a good consideration to each creditor, namely, the

undertaking by the other compromising creditors to give up a part of their claim. But no such agreement can operate as a defense if made merely between the debtor and a single creditor. The other creditors, or some of them, must also join in the agreement with the debtor and with each other; for otherwise it would be a bare contract to accept a less sum in satisfaction of a greater, which would be invalid by reason of want of consideration for relinquishing the residue." (See the correction of the report of *Norman* v. *Thompson*, by WILLES, J., at p. 429.)

In *Norman* v. *Thompson*, PARKE, Baron, said "an agreement by two or more of the creditors to enter into a composition is perfectly good and binding as to those parties, whether the others do so or not. The agreement by each individual to give up part of his claim is a sufficient consideration."

Although in *Boyd* v. *Hind* and *Norman* v. *Thompson*, the instrument recited that "each of the undersigned creditors in consideration of the agreement therein contained on the part of the others," agreed with the others, and also with the debtor, yet I apprehend such a clause is not essential. I think an agreement between themselves will be legally inferred from an instrument in which several relinquish part of their demands.

In *Good* v. *Cheseman*, four creditors, including the plaintiff, signed a paper reciting, that the defendant was indebted to them for goods sold and delivered; that he was unable to make immediate payment of the same, and they agreed to receive payment of the same by his covenanting to pay to a trustee one-third of his annual income, and to execute a warrant of Attorney as collateral security therefor.

And in *Boothbey* v. *Sowden*, (3 Camp. 174,) the agreement was with the debtor only.

The cases, also, in which, any agreement to pay a particular creditor something beyond the composition amount has been held void, bear upon this point. The agreement in *Breck* v. *Cole*, (4 Sandf. S. C. R., 80,) had no stipulation as between the creditors themselves, and Justice DUER says, "every composition deed is, in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor."

There was no such clause in the cases of *Knight* v. *Hunt*, (5

Bingham, 432,) *Constantine* v. *Blache*, (1 Cox, 287,) or *Cullingworth* v. *Loyd*, (2 Beavan, 385,) an important case.

The basis of the doctrine is, the relinquishment to the debtor by the others who sign, of a part of their claims, or the concession of some modification of the right to enforce them; this constitutes the consideration, and as this exists without any such clause as is referred to the implication of an agreement among themselves is raised, and is equivalent to its expression in the instrument.

Is this rule recognized, disavowed, or modified by any binding decision in our own Courts?

The general principle that such deeds are agreements between the creditors themselves, as well as between them and the debtor is stated in *Breck* v. *Cole* (4 Sandf. S. C. R., 80,) and *Hughes* v. *Alexander* (5 Duer, 488–493).

The decision in *Fellows* v. *Stevens* (24 Wend., 294,) was that the creditor might, under the circumstances of the case, withdraw his assent to a composition deed; and then the debtor was there estopped from setting it up.

Acker v. *Phœnix* (4 Paige, 305,) was the case of an explicit condition in the instrument, that the signature should be void unless all the creditors assented to the agreement. An attempt was made to prove a change in this condition by parol, and was rejected.

My conclusion is, that the agreement in question was operative and binding upon the plaintiffs.

2d. The variation in the date of the notes from the 1st of February to the 1st of January, seems to me immaterial. It is not expressly stipulated that the notes should bear date the 1st of February. They are to be at six, nine and twelve months from the 1st of February. The period of maturity is the principal matter provided for, and the notes at seven, ten and thirteen months from the 1st of January matured at the same time as the others would have done.

It is said that the plaintiffs' claim is only $7,236.56, as demanded in the complaint, while the notes tendered amount to $9,677.-14; and if accepted would have been a fraud upon others. But the debt to the plaintiff is set down at $16,335.67. Sixty cents on the dollar would be $9,801.40. The statement at the

bar was, that other notes had been sued upon in another Court. At any rate, there is nothing, upon the case before us, in this point.

The discrepancy between the $9,801.40 (sixty per cent of $16,335.67,) and the amount of the notes tendered, $9,677.14, is readily accounted for. The $16,335.67 was not all of it payable until after February 1st, 1857. By the agreement, there was to be a rebate of interest, so as to determine the amount of the compromise notes by "considering the debts as due" on that day.

3d. It is insisted that the payment to some of the creditors in cash was a fraud, and avoids the composition. The evidence is of various settlements of claims for cash; two other small ones at sixty cents; many at a rate varying from fifty to sixty cents, less the interest. The amount over sixty cents actually paid does not exceed $250, as far as can be gathered from the evidence. We are satisfied that the inference of fraud from these facts is unwarranted; but at any rate, such a question ought to have gone to the jury, and the plaintiffs ought to have requested it to be put to them, if they deemed it possible to support the allegation.

4th. Some exceptions were taken to the rulings of the Judge in respect to the evidence. No point connected with them is now made by the plaintiffs' counsel. We have, however, examined them, and think they are all untenable.

5th. In regard to the exception on account of the refusal of the Judge to submit to the jury whether the defendant Tuller did not intend to make $10,000 by the compromise, and if so, that it was a fraud; no point is now made by the appellants' counsel. It was slightly adverted to on the argument. We think, that such a point would have been plainly untenable.

The judgment must be affirmed, with costs.

The other Judges who heard the argument concurred in affirming the judgment.

Judgment affirmed.

PATRICK O'SHEA, Plaintiff and Respondent, v. JAMES B. KIRKER and JOHN G. SHEA, Defendants and Appellants.

1. Where the complaint, in an action of tort against two defendants, alleges that the defendants jointly did the wrong complained of, and the referee to whom the whole issue was referred so finds; but also finds, that one defendant injured the plaintiff to the amount of $150, and the other to the amount of $600; the plaintiff may enter judgment against both defendants, jointly, for the larger sum. (HOFFMAN, J., *dissented.*)
2. The judgment may be so entered, notwithstanding the referee decides that the plaintiff recover against the one defendant $150, and against the other $600, damages.
3. When several persons are made defendants in an action of tort, in which it is alleged and proved that they jointly did the wrong complained of, each is as absolutely liable to the plaintiff for the whole damage, as the other.
4. Where, in such a case, the jury or a referee severs the damages, and the plaintiff enters a judgment against all for the larger amount, the judgment will not be reversed because a *remittitur* of the lesser amount is not formally entered on the record. The entry of such a judgment, *per se*, remits all claim to the lesser amount.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, January 14; decided. January 29th, 1859.

THIS is an appeal by the defendants from a judgment entered against them on the report of *William Kent, Esq.*, as referee.

The complaint charges that the defendants, on or about the 24th of June, 1856, and on other days between that day and the commencement of this action, at the city of New York, unlawfully, maliciously, &c., composed and published of and concerning the plaintiff, in a printed circular, certain false and defamatory matter, which is set forth, to the damage of the plaintiff, and prays judgment for $20,000 and the costs of the action.

The defendants answered separately. On the trial the publication was admitted. The libelous circular was composed and written by the defendant *Shea*, and it bore the printed signature "Edward Dunigan & Brother," the name of a firm under which the defendant, *Kirker*, transacted his business. John G. Shea, at the time of writing, issuing and circulating the article complained of, was in the employ of Kirker, and was also transacting some

business on his own account. Kirker saw the circular, and knew of its being issued and circulated, and the same was issued and circulated from his business establishment.

The action was referred to *William Kent, Esq.*, as referee, who found, among other things, as follows: "The referee finds that the alleged libelous matter was wantonly and unjustifiably made and published by the *defendants.*"

As a conclusion of law on the facts of the case, "the referee finds that the plaintiff is entitled to recover damages against the defendants for an *unjustified* libel."

Upon an idea that one defendant was more censurable than the other, the referee severed the damages, and found "that the plaintiff has sustained damages from the defendant, Kirker, to the amount of $150, and damages from the defendant, John G. Shea, to the amount of $600." "The referee, therefore, decides and reports that the plaintiff, Patrick O'Shea, do recover judgment against the defendant, James B. Kirker, for $150, and that he do recover judgment against the defendant, John G. Shea, for $600."

The judgment (entered on the 14th day of May, 1858), recites that the action was referred to William Kent, as referee, the trial of it before him, and the filing of his report, dated the 14th of September, 1857, "whereby it is found, decided and declared," "that the same" (the libel) "was wantonly and unjustifiably made and published by the defendants, and that the plaintiff is entitled to recover damages therefor against the defendants, James B. Kirker and John G. Shea, to the amount of $600, and for his costs," and then adjudges that the said report be "in all respects approved, ratified and confirmed," and that the plaintiff recover judgment against both defendants for said sum of $600, together with $159.09 costs and disbursements, in all amounting to $759.09, and that he have execution therefor.

From this judgment, both defendants appealed to the General Term.

James T. Brady and *John D. Burchard*, for the defendants and appellants.

The judgment is erroneous, being taken against both defendants for the larger amount.

1st. At common law it was, in actions of tort, error to sever in awarding damages as against various defendants. The Courts, in order to avert the consequences of that error, invented the proceeding of electing *de melioribus damnis*. It is at least doubtful how far a Court had the power thus to visit upon a defendant a penalty which the tribunal of fact did not intend he should incur. We insist that no such power ever in fact existed, and it was a gross act of usurpation, especially in a case of trial by jury, to deprive a defendant lightly mulcted, of the conclusion which as to him was reached by the tribunal to whose judgment and its effect he had a constitutional right. That right extended as well to the amount of damages, as to the question of liability. The error seems much greater, considering that this power, though deemed the act of the Court, was, in fact, that of the plaintiff.

2d. It will be found, on an examination of the authorities, that the Court of Kings Bench, in the year 1771, Lord MANSFIELD presiding, reversed a judgment in a action for a *joint tort*, because the jury had found the trespass to be *joint*, and yet had given several damages. (*Hill et al.* v. *Goodchild*, 5 Burrow, 2790.)

But neither in that case, nor in any other known to us, has it been determined that it is error for the jury to sever the damages *where there are several acts of trespass, as to some of which, certain of the defendants are guilty and others not, or where the defendants are charged jointly and severally, or have pleaded separately*. In the case just cited, the Court expressly state that they make no *decision as to such instances.*

3d. We are not aware of any case in which it has been held that where several damages are assessed, the plaintiff may take judgment against any defendant alone or jointly with others, *for any amount not awarded against him.* The election allowed in such cases is to take judgment against any one defendant *for the amount in which he is mulcted*, simply because the plaintiff might have sued him alone. (See Tidd's Practice, 805; Graham's Practice; *Mitchell* v. *Milbank et al.*, 6 T. R., 199; 5 Burrow, 2790, and the cases there cited; Sedgwick on Damages, 584; *Holley* v. *Mix*, 3 Wend., 350.)

4th. There is, however, a distinction between all the cases heretofore adjudged, and the present, not only in reference to the effect of the Code *generally*, but because here, the referee, acting

in the place of *the Court*, *has not only declared that the acts of the defendants were several, and differed in delinquency, but has also assessed separate damages.*

He has found that Shea acted *wantonly*, and Kirker *incautiously*.

The plaintiff could not, on this state of facts, enter *any judgment other than such as the report authorized.* (See Code, § 272.)

5th. But the whole fiction, invention or usurpation thus criticised, has fallen through from the want of any reason to maintain it.

The Code authorizes several judgments against several defendants in all kinds of actions.

And the Court has no power under the Code to award any other damages against a defendant than such as have in the first instance been assessed against him. (Code, §§ 260 to 264 and 274.)

For the preceding reasons this judgment should be reversed, and a new trial ordered.

William Fullerton, for respondent (the plaintiff).

The judgment is properly entered up for the largest amount of damages, against both defendants. (*Beal* v. *Finch*, 1 Kern., 128.)

BY THE COURT—BOSWORTH, Ch. J. The learned referee, before whom this action was tried and by whom it was decided, found as a fact, "that the alleged libelous matter was wantonly and unjustifiably made and published by the *defendants*," and held, "as a conclusion of law, on the facts of the case," "that the plaintiff is entitled to recover damages against the *defendants*, *for an unjustified libel.*"

He futher states in his report, that he severed "the damages as the defendant Kirker appears to have taken little part in the libel, and is chiefly censurable for allowing the charges against the plaintiff to go forth attached to a circular under the name of his firm, while the defendant John G. Shea wrote and personally caused to be circulated this libelous matter."

He further found that *Kirker* damaged the plaintiff to the amount of $150, and *Shea* to the amount of $600, and decided

that the plaintiff should have judgment against the former for $150, and against the latter for $600.

If the two, jointly, did the *wrong*, and if the amount of resulting damage is correctly found, then *that wrong* damaged the plaintiff to the amount, at least, of $600.

Each defendant, in judgment of law is liable for the whole of such damage, and one is as absolutely liable to the plaintiff for the whole damage as the other. (*Bohun* v. *Taylor*, 6 Cow., 313; *Knickerbacker* v. *Colver*, 8 id., 111.)

When several persons are united as defendants, in an action of tort, alleged to be their joint tort, and it is established, that all jointly did the wrong complained of, the damages cannot be severed. The plaintiff, in such a case, is entitled to a judgment against all jointly, for the whole amount of damages, which it is proved that such wrong caused him.

When a jury, or referees, on such a state of facts, attempt to sever the damages, and find that one sum should be paid by one defendant, and a different sum by another, they constitute themselves into a *quasi* Court of Chancery, with no rules to guide them in apportioning damages, except such as seem to them "*equitable*," in the particular case, and override the stern rule of the common law, that each defendant is liable for the whole damages. And they seem to forget, for the moment, that a plaintiff can have but one satisfaction, and that settling with one of such wrong-doers, or collecting from one of them the amount assessed against him separately, discharges all. I think it just to say, they seem to forget this rule, because in such cases, it is fair to presume they intend that each defendant shall pay the damages assessed against him. In the case before us, it is quite evident, the referee intended, so far as his action might affect that question, that the plaintiff should recover $750; viz.: $150 of *Kirker*, and $600 of *John G. Shea.*

On the facts found by the referee, the plaintiff was entitled to a judgment against both defendants for $600, unless the referee's erroneous severance of the damages, and the provisions of the Code as to the form and nature of a judgment to be entered on the report of a referee to whom the whole issue has been referred, have deprived him of that right.

If the cause had been tried by a jury, and they had found the facts which the referee has found, and had then severed the damages, assessing them as the referee has done, the plaintiff could take judgment against both defendants for $600.

At all events, we should hardly be justified in holding to the contrary, against the decision of *Halsey et al.* v. *Woodruff*, (9 Pick., 555,) and the terms of decided approbation, in which that decision is spoken of in *Beal* v. *Finch*, (1 Kern., 135, 136, and 141, 142, id.) (See also *Dean* v. *Thornton & Dutton*, 3 Kern., 266, and *Blodget* v. *Morris*, 14 N. Y., 482; *Bulkley* v. *Smith et al.*, 1 Duer, 643.)

In *Hill et al.* v. *Goodchild*, (5 Burrow, 2790,) (in an action against two for an assault and battery,) Lord MANSFIELD observed, that "the present question is, whether, upon a charge of a joint trespass, the jury can assess damages according to different degrees of guilt; though the real justice is, that the damages should be respectively assessed in proportion to the real injury done by each defendant." On delivering subsequently the opinion of the Court, he said, "And the present case is, that the count is of a joint trespass; and the jury have found the defendants guilty of a joint trespass, and yet have severed the damages. We are of opinion that in *such* case the damages *cannot be severed*. The consequence is, that the judgment must be reversed." If that decision declares the law correctly, a judgment, entered upon the report of the referee, against each defendant for the amount assessed against him would be erroneous, and for that cause alone, would be reversed.

In *Mitchell* v. *Milbank et al.*, (6 Term. R., 199,) Lord KENYON, Ch. J., declared, that to enter several judgments against the defendants, (who were found guilty of a joint trespass,) on separate and several assessments of damages against them, would be erroneous.

We have not been referred to any adjudication by which a contrary rule has been applied. In some cases, when the jury have severed the damages, the plaintiff has entered a *nolle prosequi* against all the defendants but one, and taken a judgment against that one only, and that was held to be regular, and to have cured the verdict, as in *Rodney* v. *Strode*, (in Carth., 19,) and *Holley* v. *Mix & Clute* (3 Wend., 350; See 1 Sand., 207, note 2).

The decision in *Halsey et al.* v. *Woodruff*, (9 Pick., 555,) seems to us, but an application of the rules, that each is liable for the whole damages, and that there can be but one judgment against those united as defendants in the same action and proved to be guilty of a *joint* tort. It follows, logically, that judgment must go against all for the amount of damages established, as the result of such joint tort. In that case, the plaintiff entered a *remittitur* as to the lesser amount of damages. The same practice was pursued in *Bulkley* v. *Smith & Keteltas.* (2 Duer, 267; *S. C.*, 1 Duer, 643.)

As the judgment was reversed upon grounds which did not involve a decision of the question whether such a judgment was regular and free from error, that question was not passed upon. Mr. Justice DUER intimated very distinctly that, "as at present advised, if the conflict of authorities is such as to allow a liberty of choice, we certainly should refuse to follow" the doctrine that a plaintiff in such a case "may enter his judgment against all the defendants for the largest damages that are given." (Id., 271.)

We must concede it to be well settled that a plaintiff in such a case is entitled to a judgment against all for the amount of damage which he proves he has sustained from their joint tort, and that damages cannot be assessed against the defendants severally, according to their different degrees of guilt.

When, under a misapprehension of the rule forbidding a severance of the damages, the jury have in fact severed them, it is the right of a plaintiff to remit the lesser sum or sums, and take judgment against all for the larger sum. The party, by entering such *remittitur*, does not deprive either defendant of any *substantial* right. The issues have been tried in the presence of each defendant in an action to which he was a party, and upon such evidence as he chose to offer, and the actual damages caused by the joint tort of himself and his co-defendants, have been correctly found upon the evidence and under an accurate application of the rules of law to the case. The judgment which follows as a necessary consequence, is declared by law; that judgment is a joint one against all for the damage caused by their joint tort.

The entry of a *remittitur* is a matter of form. The entry of a joint judgment against all for the larger sum (the amount of the actual damage), and for that only is, *per se*, an election to

take judgment against all and for that sum only, and effectually remits all claim to the lesser sum, in addition to that for which the judgment is entered.

The judgment should not be reversed merely because there is no formal entry on the record of a *remittitur* of the lesser sum. (2 R. S., 425, § 7, sub. 13 and 14; Code, § 176; *Bate* v. *Graham*, 1 Kern., 237.)

We therefore think it quite clear that if this action had been tried by a jury, and they had severed the damages, as the referee has done, and a judgment like the one before us had then been entered, it could not be reversed on the mere ground that it had been entered against all for the larger sum.

Section 274 of the Code has not changed the rule as to the *liability* of each or either of several defendants, proved to have committed a tort jointly, nor does it introduce any new rule by which to determine when a several judgment against one of several defendants may properly be entered. So far as those questions are concerned, the Code leaves them to be determined by pre-existing law.

We cannot accede to the proposition that this section authorizes a severance of damages and several judgments, when all the defendants are proved, at the trial, to have committed jointly the tort complained of, and charged to be their joint act.

Do the provisions of the Code, as to the trial of actions by referees, and as to the judgment to be entered upon their report, make it necessary that a new trial should be ordered on such a state of facts as this case presents, or preclude the plaintiff from entering a judgment against all for the larger sum?

Referees are required "to state the facts found and the conclusions of law separately." "The report of the referees upon the whole issue, shall stand as the decision of the Court, and judgment may be entered thereon in the same manner as if the action had been tried by the Court." (Code, § 272.)

"Upon a trial of a question of fact by the Court, its decision shall be given in writing, and filed with the clerk, within twenty days after the Court at which the trial took place. Judgment upon the decision shall be entered accordingly." (Id., 267.) "Accordingly," in this connection, means, probably, "according to such decision."

The referee found that the defendants jointly committed the tort, charged in the complaint as their joint act, and that the plaintiff had been damaged thereby to the amount of $600. (There is no question made that the damages have been assessed at too large an amount.) Had the report stopped here, there can be no doubt that a single judgment against both for $600 damages would have been a regular, and the appropriate judgment on such a state of facts, and that no other could have been entered.

That part of the report which severs the damages, is irregular, and is outside of and beyond the full and correct performance by the referee of his whole duty as such referee. That part of the report which is to the effect that judgment be entered against Kirker for $150, and against Shea for $600, is in conflict with that part which finds, as a fact, "that the alleged libelous matter was wantonly and unjustifiably made and published by the *defendants*," and declares, "as a conclusion of law on the facts of the case," "that the plaintiff is entitled to recover damages against the *defendants* for an unjustified libel," so made and published by them.

The proper judgment on such a state of facts, and under such a rule of law, is a joint and single judgment against the two for the amount of the damage caused by such joint act.

Overruling the decision of the referee, that there shall be a judgment against each for the amount assessed against him, and holding that a single judgment against the two for the larger sum should be affirmed, is but pronouncing a judgment in accordance with the facts as found. When no attempt is made by either party to question the accuracy of the referee's conclusions of fact, the Court on an appeal from the judgment, by whichever party the appeal may be taken, should direct such a judgment as the law pronounces, upon the facts thus found.

In this case, if a judgment had been entered by the clerk, on the report of the referee being filed, and in the terms of the report, and exceptions to the decision of the referee had been duly filed, and if the plaintiff had appealed from such judgment, the Court would be required (the accuracy of the decision of the allegations of fact being unquestioned) to order such a judgment as has been entered.

But the judgment is now regularly before the Court on an appeal from it, and the duty of the appellate Court is the same, whoever may be the party appealing. Such a judgment should be given by the appellate Court, as the facts specially found require.

The severing of the damages, like the severance of damages by a jury, may be regarded as an irregularity, not affecting any substantial right. And all directions based on such irregularity may be corrected, and judgment given according to the justice and law of the case. A correct judgment has been entered. If any irregularity, "error, or defect, in the pleadings or proceedings," has occurred in the progress of the trial, up to, or in entering the judgment, "which shall not affect the substantial rights" of either defendant, the Court is required, by section 176, to disregard it, and is prohibited from reversing the judgment by reason thereof.

The questions presented by this appeal may be briefly stated thus:

These defendants have been sued together, and are charged with having jointly committed *a tort*. On a trial of the issues, joined in the action, between them and the plaintiff, it has been proved that they jointly did the wrong, and that the plaintiff has been damaged thereby, to the amount of $600. These facts have been established by competent and sufficient evidence. Judgment has been entered against both defendants for $600. This is the proper judgment. Do the facts, that the referee severed the damages assessing them at $150, against one defendant, and at $600, against the other, and deciding that judgment should be entered accordingly, require a reversal of the judgment that has been entered? Or shall such severance of damages, and the decision founded on it be disregarded, and the judgment, which is right in itself and according to law, be affirmed?

We are of opinion that it should be affirmed. We, therefore, order an affirmance, giving liberty to the plaintiff, to modify the form of the judgment, (if so advised,) so as to state that he elected to remit the lesser sum, and take judgment against both for the larger sum, and to enter a judgment, that the judgment appealed from be thus modified, and that, as thus modified, it be in all things affirmed.

HOFFMAN, J. (Dissenting.) I have not before had occasion to consider the question in this case, and it struck me upon the argument as strange and inequitable, that, when a separate and inferior degree of culpability, in one of two defendants, had been found by a jury, and they had determined the compensation to be rendered for his wrong, a Court could charge him with a higher penalty. The referee, in this case, stands, by consent, in place of a jury. The same rules must prevail. He has found, indeed, that the whole damage sustained from the publication of the libel is $750; but he has, as distinctly found, that the proportion of this amount, for which Kirker should respond for his participation in the act, is $150, and that Shea should bear the rest. "The defendants are guilty, yet the degrees of their guilt are different, and the real justice is, that damages should be assessed respectively, in proportion to the real injury done by each defendant." It is inevitable that a principle, thus stated by Lord MANSFIELD, and commended by its common sense and equity, will be acted upon by juries.

It seems to me impossible to answer or evade the powerful argument of the counsel of the defendants, that the juridical constitution of the country, has, in cases like the present, as entirely vested in a jury, the right to determine the amount of compensation for a wrong, as to pronounce a party guilty of that wrong. The measure of redress against an offender is as absolutely within their province as the question of his offense. If a Judge or referee, under our system, is substituted by consent, his office and duty are the same. How a Court, sitting to revise and correct errors of law, or to furnish a further opportunity for obtaining justice in matters of fact, can increase the amount thus adjusted, reverse the determination, and impose a further augmented penalty, is beyond my legal comprehension to understand.

Lord MANSFIELD, in 1771, declared "that there was great confusion in the cases upon the subject; and some of them were diametrically opposite." Mr. Justice ASTON observed, that some were decided upon principle, not agreeably to his understanding. (5 Burrows, 2790.) This complaint was repeated by Chief Justice KENT, in 1806. He "was surprised to meet so much contradiction and uncertainty upon the subject." (1 John.

R., 290.) Perhaps obscurity and indefiniteness still linger over some portions of it.

Some of the numerous authorities establish this rule, a rule not open to dispute, that when the act from which the injury has resulted is one and indivisible, and several have concurred in it, that act is the act of each. If they are sued jointly, (whether they unite or sever in their defense,) and are found jointly guilty, the verdict ought to be taken against them jointly, and but one sum for damages be assessed against all. Such should be the direction of the Court to the jury. If followed by the jury, there is no error. If disobeyed, either the Judge may refuse to receive it, or the verdict may be set aside, and a new trial had, or judgments, if entered in severalty, may be reversed.

Eliot v. *Allen and six others*, (1 Com. Bench R., 18,) is a striking example of this class of cases. The action was for false imprisonment, seizing a supposed lunatic and carrying him to, and detaining him in a workhouse. The defense was, that he had been taken up on reasonable information, and that the defendants all acted in an official capacity; but their relative official positions and powers were different, and the acts of some were clearly of a less degree of wrong than those of others. Chief Justice TINDAL told the jury that the plaintiff could only recover damages against the defendants for any joint act committed, or assented to by all of them. The jury returned a verdict against all, except Allen, and assessed the damages at £400.

On motion for a new trial, it was pressed, that some of the defendants, particularly one Semple, were slightly culpable, and the jury ought to have been instructed to sever in their verdict. But it was *held*, that there was one joint trespass; all were guilty of the same trespass, or not guilty at all; and the charge of the Judge was sustained.

This was the point, and the only point expressly decided in *Hill* v. *Goodchild*. (5 Bur., 2790.) Several damages having been assessed against two, and the judgment entered being against them severally, and it being a case of one joint trespass, the judgment on writ of error to the Common Pleas, was reversed.

Everything that is held or said in the case of *Bohun* v. *Taylor*, (6 Cow. R., 313,) falls within this principle. There was a question

as to the admissibility of Collins, a co-trespasser, as a witness, a default having been taken against him. "There was one fact one time, and one place. Both being found guilty of the whole trespass, the damages must be entire, although the defendants sever, and one suffer judgment by default."

And this principle is found in the case of *Mitchell* v. *Milbank and others.* (6 T. R., 199.) In trespass for assault and battery against three, there was judgment by default. Three writs of inquiry were executed, with different damages. The plaintiff, before judgment, moved to set aside his own proceedings, and execute one new writ. This was permitted, Lord KENYON saying, if he had entered up final judgment for the several damages it would have been erroneous.

So *Crane* v. *Hummerstone*, (Croke Jac., 118,) was simply the case of a reversal on error for taking judgment severally on separate assessments of damages against several. *Mathews* v. *Cole*, in the Exchequer Chamber, (Croke Jac., 384,) was exactly the case of *Eliot* v. *Allen.* The judgment was joint on damages assessed entirely. And it was sustained, upon a writ of error alleging error in not assessing damages severally, upon the several issues of different defendants.

To the same point, is the case of *Palmer* v. *Crosby.* (1 Blackf. R., 140—Indiana.)

Another class of cases involves the rule, that where the act is in itself single, but several have united in it, and the plaintiff has sued the defendants separately, a recovery and satisfaction in one suit is a bar to a recovery in any other. *Thomas* v. *Rumsey*, (6 Johns. R., 26,) was of this character, and may be usefully stated.

The action was libel, and there was a plea, *puis darrein continuance*, of a former action and recovery, and satisfaction against one Henry Dodd for the same identical writing and publishing, and causing or procuring to be written and published, the same identical alleged libel. There were other proper averments in the plea.

The case arose upon a demurrer to the plea and a joinder. The plea was sustained and judgment given for the defendant.

THOMPSON, J., said: "The demurrer admits the libel and publication in the present action to be the same, as in the action

against Dodd. We are therefore to take it for granted that there was but one publication, and that was the joint act of the defendant and Dodd. There is, then, but a single injury, and if the plaintiff could have maintained a joint action, it would be unjust that he should have a double satisfaction. The making and publishing a libel are matters susceptible of a joint concern and undertaking, as much as a trespass."

This rule was recognized in *Martin* v. *Kennedy*, (2 Bos. and Pull., 69,) as applicable where a trespass was one act, such as cutting grass in a field; but the interference of the Court before trial was refused, where several suits on a libel were proceeding against different persons. Lord ELDON, among other things, observed, that the person who disperses the libel as a mere agent, and the principal himself, ought to suffer in very different degrees.

There is another and important series of cases. If the plaintiff proceed for a joint indivisible wrong, against several, in separate actions, he may go on to judgment, and may elect to enforce his judgment against the party as to whom he obtains the largest damages. And after satisfaction, at least, his proceedings will be stayed against the others. In this sense the doctrine *de melioribus damnis* is reasonable and just.

This is the rule which Chief Justice KENT, as I understand him, declares to be the more rational one, (*Livingston* v. *Bishop*, 1 Johns. R., 290;) and this I take to be the whole extent of the rule declared in *Cocke* v. *Jenner*, (Hob., 66,) and in *Corbet* v. *Barnes*, (Wm. Jones, 377,) cited by him.

There is another class of authorities, within the same principle, of which *Holly* v. *Mix & Clute*, (3 Wend., 350,) is an example. Both defendants were found guilty of the false imprisonment. Six cents' damages were given against Clute, and twenty-five dollars against Mix. The plaintiff was allowed to enter a *nolle prosequi*, against the former, and to have his judgment against Mix.

This is also the rule established in two cases in Kentucky, (*Stone* v. *Matherly*, 3 Mon. R., 137; and *Dougherty* v. *Dersey*, 4 Bibb, 208.) If several damages are assessed in trespass, the plaintiff may take judgment for the greater sum, against him or them, on whom they are assessed; but cannot have several judgments. If equal damages are assessed against two, he may enter

a *remittitur* as to one, and take judgment against both for the sum assessed against the other; or may enter a *nolle prosequi* as to one, and take judgment against the other only."

And the old and important case of *Rodney* v. *Strode*, (Carth. R., 19,) is precisely to the same point. The action was trespass against three, and an assessment of several damages. The plaintiff entered a *nolle prosequi* against all but the one, as to whom he had obtained the heaviest amount.

But on what authority does the proposition rest, that the doctrine, *de melioribus damnis*, warrants the entry of judgment for an increased amount against one defendant, when a jury has found that he should only be liable in a lesser sum—to charge him, in fact, with part of the penalty of the delinquency of his associate, as the jury have settled that delinquency?

Heydon's case, (11 Coke's R., 5; Croke Car., 192; 1 Wilson's R., 30), are generally cited. Mr. Tidd (Practice, vol. 1, p. 322,) quotes them for the rule. *Eliot* v. *Allen* (*ut supra*), *Clark* v. *Newsam*, (1 Exch. R., 131,) *Rochester* v. *Anderson*, (1 Bibb, 434,) *Halsey* v. *Woodruff*, (6 Pick., 555,) have also been referred to. To these may be added *Simpson* v. *Perry*, (9 Geo. R., 508,) *Schultz* v. *Hunter*, (1 Browne's R., 233, Penn.,) and *Beal* v. *Finch*, (1 Kern., 128.)

In *Bulkeley* v. *Smith*, in this Court, the Judges, upon consultation by the Chief Justice, first refused to set aside such a judgment upon motion, because the question seemed doubtful, and it could come up on appeal (1 Duer, 643); and when the case was before the Court at General Term, it omitted to decide the point as not necessary in the case. but a strong opinion was intimated against such a proposition. (2 Duer, 271.)

Eliot v. *Allen*, (cited 1 Duer, 644, as *Elliot* v. *Anderson*,) has been before fully stated, and does not give the slightest support to the supposed rule.

Clark v. *Newsam & Edwards*, (1 Exch. R., 131,) has no direct bearing upon the point. It contains, however, a discussion of a rule sometimes stated, that a jury in a joint trespass must adjust the damages against all upon the basis of the guilt of the most criminal. Chief Baron POLLOCK had refused so to charge, and his remark, when the cause was before the full Bench, deserves great attention, that the plaintiff ought to have selected the party

against whom he expected to get aggravated damages. The Court appear to think that the injury which the plaintiff had sustained, was to be the rule of damages against all. There was another decisive point in the cause.

In *Crawford* v. *Morris*, (5 Grat., 90,) it was considered that the true rule was to give damages adjusted upon the culpability of the greatest aggressor.

In *Gregory* v. *Slowman*, (1 Ellis & Black., 360,) the Court of Queen's Bench granted a rule to show cause, expressly as Lord CAMPBELL stated, in order to have it determined whether any such law existed. The case was, however, settled.

The cases of *Schultz* v. *Hunter*, *Simpson* v. *Perry*, and *Halsey* v. *Woodruff*, (*ut supra*,) are the only authorities I have been able to find, after much research, decided in our own country, expressly in point. That of *Schultz* v. *Hunter*, in Pennsylvania, is I think much weakened by *Weakley* v. *Royer*. (3 Watts' R. 460.) *Halsey* v. *Woodruff* is indeed an express decision, and upon a deliberate reasoned examination. It is entitled to that great weight which the determination ot the Supreme Court of Massachusetts always commands. *Simpson* v. *Perry* is also in point.

And as to the opinions of those eminent jurists, Judges DENIO and PARKER, in *Beal* v. *Finch*, it may be sufficient to say that their approbation of the rule of *Halsey* v. *Woodruff*, is purely *obiter;* that the purposes of the argument they were using was as effectually served by the rule, that the assessment of several damages, when the tort is joint, and judgment accordingly, requires a new trial or reversal of judgment, as by the principle they gave their authority to sustain, that the *tort feasor*, found guilty in the less degree, should be mulcted in the penalty of the deepest offender.

On the other side the case of *Ammonett* v. *Harris and others*, (1 Hen. & Mumf., 488,) settled, that if the jury in a joint action against several for assault and battery, assess the damages severally against the several defendants, the cases of all being before the same jury, it is error, unless the plaintiff enter a *nolle prosequi* against all but one, and take judgment for the damages assessed against that one. *Crane* v. *Hummerstone*, (Croke, James, 384,) and *Rodney* v. *Strode*, (*ut supra*,) are much relied upon.

So in *Layman and others* v. *Hendrix*, in error, (1 Ala. R., 212,) the verdict in trespass against several, pleading separately was for the plaintiff, fining W. S., $100; G. L., $300; D. S., $300; and S. W., $300. Judgment was entered against all for $1,000. The Court held, 1st. That an apportionment of damages in a case of joint trespass, was unwarranted by law. 2d. The plaintiff was entitled to a joint verdict against all; an instruction to sever the damages would be error. 3d. If the jury, returning a joint verdict of guilty, should assess several damages, the irregularity could be cured by the plaintiff, either by having a *venire de novo*, or by entering a *nolle prosequi* as to all but one of the defendants, whom he may elect, and charge him with the damages assessed against him. The cause was remanded for the plaintiff to elect which of these courses he would adopt.

The case of *Crawford* v. *Morris*, (5 Grat., 90, Va.,) points out the remedy in such a case to be a *nolle prosequi* as to others, and judgment as to one. Nothing is said as to a new trial; but in our State, at least, a General Term would have the power to grant it. (Code, § 330; 17 N. Y. R., 31.)

In *Knott* v. *Cunningham*, (2 Sneed's R., 204, Tenn.,) the Court stated that in case of several actions for one trespass, and unequal damages, the plaintiff may elect which defendant to proceed against.

The same rule was declared in *Page* v. *Freeman*, (4 Bennett, 19 Mo.,) and in *Golding* v. *Hall*, (9 Por., 169 Ala.,) the rule was applied with clearness and decision, that the judgment could only be rendered against the one for the higher damages, and costs only against the others found also guilty. See also *Davis* v. *Chance*. (2 Yer., 94.)

And as to English authorities, *Heydon's case*, (11 Coke's R., 5,) is the leading case of those I have been able to find in any way tending to support the proposition. It is the only case cited in *Halsey* v. *Woodruff*, and deserves careful examination. It is shortly reported in Croke, James, p. 350 Anno., 12 Jacobi in the King's Bench, under the title of *Jeffery Cobb* v. *Sir John Heydon*.

The action was assault and battery against *Jeffery Cobb*, *Thomas Walpole*, *Froxmere Cocket*, *and four others*. The plaintiff declared against them severally with a *simul cum* as to the others. Cocket

plead *son assault demesne*. The issue was found against him with £200 damages. Walpole plead not guilty, and damages were assessed by another jury at £50, and judgment was given against him. Afterwards judgment was given against Jeffery Cobb upon a *non sum informatus*, and a writ of inquiry of damages awarded. Upon the return *vicecomes non misit breve*, the judgment was entered reciting that in an action for this battery, judgment had been recovered against Cobb for £200, &c.; and judgment was given against all the other defendants for this £200 so assessed against Cobb, (11 Coke, 6 B.,) and this judgment was affirmed in King's Bench.

When pressed with the argument that excessive damages might be given against one by consent, or negligence, with which the other would be charged, the answer was, that attaint would lie against the jury.

Perhaps the exact case of a previous trial and assesment of damages against one of several jointly charged, could not now regularly take place. It was questioned long ago in England. The same jury, by the practice now, is as well to inquire as to those who are in default, as to try the issues raised by the others.

I venture to say that the principle of Sir John Heydon's case would not be supported in our tribunals. I cannot believe that a separate trial of one in the absence of another party, charged on the record with the same offense, who has no opportunity of being then heard, could be the basis of a judgment for damages, when he denies the offense, assuming that it can be when he makes default.

The case cited from Croke, Charles, is *Johns & Robinson* v. *Dodsworth*, and is certainly in point. On a trial against two pleading separately, the jury assessed £100 against one, and £50 against the other. Judgment was taken against both in £100, and it was affirmed. The objection taken was that there had been no *remittitur* of the £50. This was overruled.

The case from 1 Wilson's Reports, 30, is *Sabin* v. *Long*—Trespass against three. Two pleaded, and the other made default. On the trial of the issue, the verdict was for the plaintiff with thirty-five shillings damages. Upon a writ of inquiry against the other, the jury assessed two shillings damages. Judgment was entered against the two for the thirty-five shillings, and against the other

for two shillings. Motion to strike out the latter, and to enter judgment against all for the thirty-five shillings. It was denied on the ground that it was not made during the same term as the judgment. The Court observed, that when several damages were given the plaintiff might take judgment *de melioribus damnis*, or enter a *remittitur;* but taking judgment for the whole, the aggregate of the verdict, was bad at law.

This review of the English cases shows that the alleged rule rests upon the doctrine in *Heydon's case*, never recognized in our State, and I apprehend indefensible in principle; upon the case of *Sabin* v. *Long*, where the defendant, by his default, had admitted the wrong and may reasonably be treated to have submitted himself to the measure of compensation found against his associates; and upon *Johns* v. *Dodsworth*, which I admit not open to any sound cavil or distinction.

If the rule was indisputable and unqualified that, in the case of a joint trespass or tort, the damages must be assessed against all upon the basis of the culpability of the chief aggressor, the argument would be strong, that, in charging the least culpable with higher damages, he cannot pay more than he legally ought to pay; that in truth he will be relieved from payment of some amount, short of the compensation which the jury have declared was the measure of the wrong. In the present case, for example, $750 was that measure, and he is charged with $600.

It is vain to imagine that the rule adverted to can ever be established with and adhered to by the juries. There is something of an innate sense, whether right or wrong, which will make verdicts, in these cases, matters of compromise between the aggravated guilt of one, and the slight participation of another; and through the whole line of cases, this feeling is exhibited in the separation of the damages assessed. In Sir John Heydon's case, the jury discriminated on this very ground, as appears by the Report, (11 Coke, 5,) and similar instances are abundant. If, as Baron POLLOCK suggests, the plaintiff will not proceed against the chief offender, he must abide by the risk of a verdict resulting from the conflict of these views. The regulation of punishment by the degree of culpability has its origin in the influence of the great law, that one shall not bear the iniquity of another; and we may hesitate in deciding which will answer

best the high purposes of justice, the reconciliation through the minds of a jury of these combatting principles, in a verdict induced by them all, or the rigid rule which makes the highest guilt the measure of punishment to the slight offender. Even here the rule contended for is not logically consistent with the principle on which it is based, for the aggregate of all the damages is the measure of the compensation and ought to be the sum charged upon each.

When the argument is pressed, that the compensation to the plaintiff, and the equal liability of the defendants, are the true principles upon which the whole question turns, we must discriminate. If the action is one which relates to property, a trespass for example in cutting down trees, the value is ordinarily the measure of damages, and each party may reasonably be bound to pay that value, because remuneration is the primary if not exclusive rule.

But when the case is one of libel, punitory damages as they are termed, almost always furnish the guide for a verdict. Very frequently there is no measure for damages by which they can be given as compensation for an injury; but they are inflicted wholly with a view to punish and make an example of the defendant. (Wallace, Jr., R., 164; *Fry* v. *Bennett*, 4 Duer R., 247; *Kendall* v. *Stone*, 2 Sand. S. C. R., 269; Sedgwick on Damages, 458–465.)

If this is so, then the culpability of a defendant is the standard of punishment, and it seems necessarily to follow, that where there are several defendants, the different degrees of their respective culpability must have, and ought to possess, consideration and effect. If the law will not permit this principle to be carried out, by sanctioning the separation of damages against several defendants, the next best method of preserving it in force is by leaving it to the jury to modify their verdict as against all, beneath its guidance, or at least admitting its influence.

My conclusion is, that while the entry of a judgment in a case of a joint trespass against several, for damages separately assessed, is ground of reversal, it is equally so, to enter judgment against two for the higher damages found against one, when lesser damages have been found against the other. This error is ground for a new trial.

Judgment affirmed.

EDWARD POTTER, Plaintiff and Respondent, v. MELANCTHON L. SEYMOUR, Defendant and Appellant.

1. Where an owner being about to erect a building on his lot contracts with a person to furnish and set the marble for the front thereof, agreeably to certain specifications, and for a definite sum agreed to be paid therefor, and such owner neither interferes with the work nor reserves any right of interference or direction, such owner is not liable to a third person for an injury sustained by the latter in consequence of the negligence of the contractor's employees engaged in setting the marble. In such casé those employees are not the owner's servants.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, December 10th, 1858; decided, February 12th, 1859.

THIS action came before the Court at General Term, by appeal taken by the defendant from the judgment entered on a verdict for the plaintiff on a trial before Chief Justice OAKLEY and a jury, on the 4th day of March, 1857.

The complaint charged in substance that the defendant was engaged by his servants and agents in erecting a building on his lot, upon John street, in the city of New York, and that during the progress of the erection, the defendant caused a large derrick to be erected thereon, and that owing to the insecure and negligent manner in which the derrick was constructed and secured by the defendant and his servants, &c., it fell and injured the plaintiff, (who was passing along the street,) very severely; and claimed damages.

The defendant, by his answer, admitted the ownership of the lot, and the fact that the plaintiff was injured by the falling of a derrick from the building, and averred that one Bunting was engaged in the erection of a brick and marble building, having been employed and contracted with by the defendant. And the defendant averred that neither himself nor any agent, servant or person in his employ, or under his direction or control, erected or caused to be erected the derrick aforesaid, or had any charge or management or control thereof, and that the acts, deeds, matters and things alleged to have been the cause of the injuries and damages to the plaintiff, were in no respect the act of the defend-

ant, nor of his servants or agents, nor of any person in his employ.

On the trial the plaintiff showed that while walking in the street he sustained the injury complained of, by or in consequence of the fall of the derrick, which was upon the top of the building, and was erected for the purpose of raising the marble, composing the front wall, by the persons employed in that work, and the evidence tended to show that it was left insecurely fastened by the workmen employed therein, when they left work the previous evening.

The defendant attempted to prove that the building was erected by one Bunting, under a verbal agreement, by which the latter was to make the erection upon his own responsibility, and without any control of the defendant. Questions arose in relation to the defendant's exoneration upon that ground, which are noticed in the opinion of the Court; but the jury found, as a fact, that Bunting acted merely as the defendant's agent. But the proof also showed that the marble front, in the erection of which only the derrick was used, was put up by one Adair, under a contract made with him by Bunting, Adair was, and had been for some years, engaged in and carried on the business of putting up marble fronts of buildings. His business he carried on as a contractor for the job—that is, by contracting to furnish the materials and put up the fronts. He contracted in writing with Bunting, that he would put up the front of the building in question, of a description of marble specified, in conformity with plans and specifications referred to, for the sum of $1,542, including the setting of the marble. He performed his contract. The workmen employed by him put up and used the derrick. His workmen were guilty of the negligence (if any) in leaving the derrick insecure. The defendant exercised no control and gave no directions on the subject. The question whether there was any negligence, or whether the derrick was thrown down by an extraordinary wind of unusual violence, and notwithstanding proper care, was contested before the jury.

The defendant's counsel requested the Chief Justice to charge the jury, that if they should find that a contract had been made with the witness, John Adair, to put up the marble front, and that he was exercising an independent employment under said

contract, and the accident was the result of his negligence or that of his servants, the defendant, in law, was not liable; or that if the negligence of Adair's servants had caused the *accident*, and the defendant had not the right to choose said servants, the defendant, in law, was not liable.

The Court then charged the jury,

1st. That if the plaintiff was guilty of any want of care, so as to have contributed to the injury, the defendant was not liable.

2d. That the jury was to inquire if there had been any bargain on the part of the plaintiff to have the work done by contract.

3d. If, by the contract with Bunting, the defendant had parted with the control of the work while it was going on, and did not interfere with Bunting, then he (the defendant) is not responsible; but if the jury should believe that Bunting was acting as defendant's agent, then he is responsible.

4th. The contract with Adair, as proved, does not affect the right of the plaintiff.

To which ruling of the Court, and each part thereof, the defendant's counsel excepted.

The case was then submitted to the jury, who found a verdict for the plaintiff, and assessed the damages at $3,500.

From the judgment entered on the verdict, the defendant appealed.

Clement D. Newman, for the appellant.

The Judge erred in refusing to charge as requested concerning the contract with John Adair.

The rule of *respondeat superior* does not apply between the defendant and Adair's workmen. The accident was the result of the carelessness of Adair's workmen. Adair was their superior, they were *his subordinates*, not the defendant's. (See *Blake* v. *Ferris*, 1 Seld., 48; *Pack* v. *The Mayor, &c.*, 4 id., 222; *Kelly* v. *The Mayor, &c.*, 1 Kern, 432.)

These cases settle the principle that no one can be held responsible as principal who has not the right to choose the agent from whose act the injury flows.

Adair was the immediate employer of the men whose negligence caused the injury. The case of *Blake* v. *Ferris* determines

that Adair alone is liable; it holds that "the immediate employer of the agent or servant, through whose negligence an injury occurs, is the person responsible for the negligence of such agent or servant. To him the principle *respondeat superior* applies. There cannot be two superiors severally responsible in such case."

Solomon L. Hull, for the plaintiff, respondent.

1. The so-called contract with Adair does not prove, or tend to prove, that defendant had parted with the control or possession of the front of said building, or any part thereof.

2. The said contract does not show that Adair had the sole and exclusive direction of putting up the front of said building.

3. Nor does it show that he had the sole and exclusive possession and control of the front of said building, while it was being put up.

4. The said building, including the front, was being erected under the personal supervision and direction of Bunting, the defendant's agent.

5. What was Adair's exact relation to the building does not appear from the evidence: whether there was in fact a contract, and if so, what were the terms and conditions of such contract is not explained by the evidence; but sufficient appears to show that Adair's relation to the building and to defendant, does not affect the right of the plaintiff to recover. (*Blake* v. *Ferris*, 1 Seld., 48; *City of Buffalo* v. *Holloway*, 3 id., 493; *McCleary* v. *Kent*, 3 Duer, 27; *Hegeman* v. *Western R. R. Co.*, 16 Barb., 360; 3 Kern., 9; *Bailey* v. *City of New York*, 3 Hill, 531; *Kelly* v. *City of New York*, 1 Kern., 432; *Pack* v. *City of New York*, 4 Seld., 222.)

BY THE COURT—HOFFMAN, J. The exceptions to the charge and the requests of the defendant's counsel are first to be noticed.

A defense set up in the answer was, that the whole erection of the building had been committed to Bunting, under a contract which gave him full and unlimited control as well as possession of the premises, and thus exonerated the defendant.

The Court charged that if the jury found that the defendant had made a contract with any one to build the store and do the

work, and had given such contractor the possession and control of the premises for that purpose; and such possession and control were existing at the time of the accident, the defendant was not liable in law.

And again, "if by the contract with Bunting, the defendant had parted with the control of the work while it was going on, and did not interfere with Bunting, then the defendant is not responsible; but if the jury should believe that Bunting was acting as the defendant's agent, then he is responsible."

It would seem that the defendant's counsel excepted to this; and yet if they did, they must be considered as excepting also to that part of the charge stating that if the plaintiff was guilty of any want of care, so as to have contributed to the injury, the defendant was not liable. This is one of four several propositions laid down by the Court, and the exception, as stated in the case, follows the four, and is, "to which ruling of the Court, and each part thereof, the defendant's counsel excepted?"

And again, the Judge charged, in the second of those propositions, "that the jury was to inquire if there had been any bargain on the part of the defendant to have the work done by contract." It is not obvious why the defendant should object to this.

It is probable that the exception was limited to the fourth proposition relating to Adair, and afterwards noticed. But if it went to the whole, we consider that, so far as it respects the defense and case connected with Bunting, or generally as to a contract with any one, the exception is not available.

The principal question arises, on the following request and charge:

The defendant requested the Judge to charge the jury, "that if they should find that a contract had been made with the witness Adair to put up the marble front, and that he was exercising an independent employment under said contract, and the accident was the result of his negligence or that of his servants, the defendant, in law, was not liable; or that if the negligence of Adair's servants had caused the accident, and the defendant had not the right to choose the said servants, the defendant was not liable in law."

The Judge charged "that the contract with Adair, as proved, did not affect the right of the plaintiff."

Adair was a contractor for putting up marble fronts. He made an estimate for the houses in question, and contracted with Bunting, who, as the jury must be taken to have found, was the defendant's agent.

The estimate of Adair was given in evidence. This he termed his contract with Bunting, to whom he gave the proposition, and who employed him to put up the fronts. The work was done according to the estimate price. The derrick was put up by Grey, a workman of Adair, employed by him for that purpose.

It may be added, that the defendant, on his examination, states that he believes Adair was employed in the erection of the building; that is, in putting up the marble fronts; that he never gave any directions to the workmen employed; that he never paid any one but Bunting; the latter mentioned to him at several times the names of persons with whom he had contracted, but did not consult him as to them. We are justified in inferring that Bunting paid Adair.

Board, the carpenter, also states that he did the carpenter's work on the building, and made his contract for it with Bunting. It was begun in June and finished in November. He did some other work for defendant in the basement, not within his contract.

It is to be assumed, then, that Bunting was the defendant's agent, through whom he made the various contracts, or employed the different persons to furnish the materials, or do the work. And the case must be treated as if such contracts and employments had been made directly with the different persons by the defendant himself. Thus, when the Judge charged that if the defendant had not been guilty of negligence the plaintiff could not recover, and that the plaintiff must show negligence, and that the contract with Adair did not affect the right, he must have meant that the negligence of Adair or his servants was that of the defendant.

Thus the case resolves itself into this. An owner employed a skillful builder to select persons with whom to contract for the building of a house, and made, through him, separate contracts, with different persons, for the main portions of the building, with the carpenter, the marble man, and workman for the front, with some others for mason work, &c. He never interfered with or directed the workmen. He did not expressly reserve any right

to interfere. Is he responsible for the faults and omissions of all and each of them, causing injury to others?

The rule of *Blake* v. *Ferris*, and the other cases in the Court of Appeals is thus stated by Mr. Justice JEWETT, (4 Seld., 226,) "The doctrine is, that a person who undertakes the erection of a building for his own benefit, is not responsible for injuries to third persons, occasioned by the negligence of a person or his servant, who is actually engaged in erecting the whole work, under an independent employment or a general contract for that purpose."

The test appears to be this: Does the relation of master and servant exist between the person sought to be charged, and the person doing the injury? And this test is applied by the inquiry, whether the latter is under the control, and subject to the orders of the former, in relation to the performance of the work.

Mr. Justice HARRIS in *Blackwell* v. *Wiswall*, (24 Barb., 355,) embodies the rule in this short form: "The only principle upon which one man can be made liable for the wrongful acts of another is, that such a relation exists between them, that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. The party sought to be charged must stand in the relation of superior to the person whose wrongful act is the ground of complaint." The decision hereafter noticed was adopted at General Term.

In *Scott* v. *The Mayor of the City of Manchester*, (37 Eng. L. and Eq. R., 495,) the rule was thus stated by Baron ALDERSON, "The person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for the acts of such servants."

In *Sadler* v. *Henlock*, (30 Eng. L. and Eq. R., 167,) CROMPTON, Justice, says, "The real test is, whether the employer has any control over the persons employed; whether the payment was by the day or the piece can make no difference. The defendant could, during the progress of the work, overlook and direct what was to be done, and the manner of doing it. It is only on the ground of the relation of employer and contractor being differ-

ent from that of master and servant, than I can understand the authorities."

Rapson v. *Cubitt*, (9 Mees. & Wels., 710,) is cited by Mr. Justice JEWETT in *Pack* v. *The Mayor*. (4 Seld., 226.) Cubitt had contracted with the Clarence Club to make certain alterations in the club-house; among other things to prepare and put up the gas fittings. He made a sub-contract with Bland, a gas-fitter, to do that part of the work. Through Bland's negligence, the gas exploded, and injured the plaintiff. The Court held, that the action would not lie against Cubitt, but only against Bland. The latter was not Cubitt's servant.

Two important cases have been determined by the Supreme Court in the third district, that of *Blackwell* v. *Wiswall*, (24 Barb., 355,) and *Norton*, *adm.*, v. *Wiswell*. (26 id., 618.) They arose out of the same state of facts. The defendant had a license to run a ferry, from the proper public authority. One Morrison was the lessee of the licensee at a yearly rent. A boatman in his employ upset a boat, by which the plaintiff's intestate lost his life. The negligence of the ferryman was the cause. The direction and management of the ferry was entirely in Morrison. It was held that the defendants were not liable. Judge HOGEBOOM in the latter case goes through the authorities with great care. He says: "Where one is the master or principal of another he is responsible for his acts, because he has conferred authority upon the latter to do the act, and because he has the power and the legal right to do the act." And he applies this rule to the facts of the case thus: "The servants of the lessee were not his" (the defendant's) "servants. He cannot control them. He cannot give them orders which they are bound to obey. Having no authority over them, and having conferred no power upon them, he is not responsible for their acts. He stands in no relation to them which makes applicable to him the maxim *respondeat superior*."

The learned Judge analyses the case of *Congreve* v. *Morgan*, in this Court, (5 Duer, 495,) and shows the various points of distinction between it and cases of the character now considered.

In *Gourdier* v. *Cormack*, (2 E. D. Smith, 254,) the Court of Common Pleas applied the doctrine of *Blake* v. *Ferris* to the case of an injury from blasting done by a contractor, who by the agree-

ment had assumed the work with the manner of performing it. The owner had no control or superintendence.

A question not unlike the present is adverted to in *McCleary* v. *Kent*, (3 Duer, 27–35,) thus, whether a contractor for an entire building may relieve himself from all liability for the negligent acts or omissions of laborers, by parcelling out the work to sub-contractors in distinct jobs was a question not arising; that the principle of *Blake* v. *Ferris* would not require the Court to go to that extent, and it was not a decision they would be willing to make.

Yet, when we once arrive at the principle that employment, control, and supervision, or the right to such, over the person whose neglect was the immediate cause of the injury, is to test all these cases, the logical result seems inevitable, that such rule is as applicable to contracts for distinct portions of a building as to a contract for the whole. Why, if a contract with a mason, and another with a carpenter, covers the whole erection, and each has the sole authority to employ and direct the sub-workmen in his particular department, why should the owner be responsible for the faults of their respective workmen and be exempt had he committed the whole erection to one of them? I have not been able to discern a solid reason for such a distinction.

The question whether a defendant has the power of employment and control, may be one of mere law or of a mixed character. Where, as in *Pack* v. *The Mayor, &c.*, it depends upon a written contract, it is merely one of law. In other cases, the acts of the party may interpret the contract. Instances of direction and interference may determine the true relation. The question is to be solved upon the facts.

It may be strictly right, however, to state two propositions, one, that the mere omission to interfere is not decisive in favor of an owner. The power to interfere may be enough. The counsel in *Norton* v. *Wiswall*, (*supra*,) asked the Court to charge this; and, next, that presumptively a contract for the entire performance of a given portion of a building, raises a presumption of control in the contractor, and of its being surrendered by the owner. The idea of a contract with a mason, for example, that he should perform the entire mason work and supply the materials, appears from its very nature to create in him the responsi-

bility, and hence to confer the authority. He is liable for the faithful fulfillment of his agreement. Entire direction and choice of servants is necessary for this. Interference might disable or embarrass him in that performance.

It seems to me that there was error committed upon the trial. Either the learned Judge should have treated the contract with Adair as a defense, or should have left some such question to the jury as the counsel for the defendant requested him to do.

Judgment reversed. New trial ordered. Costs to abide the event.

ABRAHAM FOWLER, Plaintiff and Appellant, *v.* PETER MOLLER, Defendant and Respondent.

1. A promise by the assignee of a lease to the landlord, that if the latter wil permit him to remain in possession of the premises, he will pay the arrears of rent due from the lessee, is a collateral promise, and if not in writing, is void by the statute of frauds.
2. J. H. F., tenant in possession of a store under a lease from P. M., sold out to his father, A. F., there then being $103.50 rent in arrear. A. F. took possession, and afterwards promised the landlord that if he "would allow him to remain he would pay the back rent due by his son." A. F. (the father) occupied thereafter about six weeks, sold out the goods, and gave up the premises: *Held*, upon these facts, that A. F. was not liable for the arrears of rent, but only for the rent which became payable after he took possession.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, December 15th; decided, February 12, 1859

THE case came before the Court upon an appeal from a judgment entered upon the decision of PHILO T. RUGGLES, Esq., as referee. He found that there was nothing due from the defendant to the plaintiff; but, on the contrary, that the plaintiff was indebted to the defendant in the sum of $5.14. Judgment for the defendant was entered upon his decision for that amount, with costs, being, in the whole, $85.69.

The plaintiff demanded in his complaint the value of a rosewood sofa, alleged to be reasonably worth $95, and of a walnut centre table, alleged to be reasonably worth $55, delivered to the defendant at his request, and sent to his residence, and prayed judgment for $150, with interest and costs.

The answer denied only the value of the centre table. Delivery of the articles, and the value of the sofa, were therefore admitted. It averred that the centre table was made of bad and inferior materials, and made in a rough and unworkmanlike manner, and that it was not worth more than $35.

The answer then averred, by way of counterclaim, "that the plaintiff owes the defendant for the use and occupation of the defendant's store, at the corner of Clinton and Madison streets, in the city of New York, and, as the tenant of the defendant, and, as the lessee of the defendant's premises, the sum of at least $150, besides interest from the 15th of March, 1856."

The plaintiff replied to the counterclaim, denying all the allegations relating thereto.

The cause was referred to PHILO T. RUGGLES, Esq., to hear and determine the issues.

The referee found as follows:

1st. That the plaintiff, Abraham Fowler, delivered to the defendant, Peter Moller, in the month of June, 1856, and at his request, one rosewood sofa, and one walnut centre table, and that the said sofa was reasonably worth $95, and the centre table $45, thus making the whole amount of the claim which the said plaintiff established against the said defendant the sum of $140.

2d. That at the time and before the said plaintiff delivered the said sofa and centre table to the said defendant, he, the said plaintiff, was indebted to and owed the said defendant for the use and occupation of the defendant's store at the corner of Clinton and Madison streets, in the city of New York, and as the tenant and lessee of the said defendant's premises, and over and above all offsets, the sum of $145.14.

3d. That, at the time of the commencement of this action, there was and still is justly due and owing from the said plaintiff to the said defendant, over and above all offsets and counterclaim, the sum of $5.14.

The referee also arrived at the following conclusion of law:

That the said plaintiff is not, and was not, at the commencement of this action, entitled to anything from the said defendant but that the said defendant was and is entitled to judgment against the said plaintiff for said sum of $5.14, together with his costs, and to have execution therefor.

Exceptions were taken to the finding and decision of the referee, sufficient to raise all the questions.

Upon the trial, evidence was given by each party on the subject of the value of the centre table, in controversy. And to establish his counterclaim, the defendant put in evidence a lease from himself, to John H. Fowler, a son of the plaintiff, by which the defendant let to the said John H., a store at the corner of Clinton and Madison streets, in the city of New York, for the term of two years, eight months and seventeen days, from the 13th August, 1855, to end on the 1st day of May, 1858, at the yearly rent of $350, payable quarterly, with various covenants, which it is not material to state, and with a provision that if default be made in the payment of rent, the lease and the relation of landlord and tenant shall, at the option of the lessor, wholly cease and determine, and the lessor may re-enter, &c.

The defendant then proved, without contradiction, that John H. Fowler, the son, occupied the demised premises until about the 1st day of February, 1856, and then sold the store or place to his father, the plaintiff, who entered on or about the 4th of February, and occupied for about six weeks. At that time, about $102 were due to the defendant, from John H. Fowler, for rent accrued under the lease. The defendant showed, by one of the witnesses, that after the plaintiff took possession, he "told the witness that he had made an agreement with the defendant, that if the defendant would allow him to remain, he would pay the back rent due by his son;" and, also, that the "plaintiff, five or six weeks ago, admitted that he had made the promise, and that it was not valid, because it was not a written one," and again, "the plaintiff admitted more than once, that he had made the verbal agreement to pay the back rent of his son, but that he was not liable as it was not in writing."

The referee allowed to the defendant, as a counterclaim, the rent accrued during the occupation by his son, and also the rent for the period of his own occupation.

From the judgment entered upon the report of the referee, the plaintiff appealed.

George Carpenter, for the plaintiff (appellant).

1. The plaintiff's promise not being in writing expressing the consideration, is void. (2 R. S., 135, § 2, sub. 2.)

The original debtor was never discharged, but still remains liable. The plaintiff's promise was therefore collateral and within the statute. (*Brewster* v. *Silence*, 4 Seld., 215; *Watson* v. *Randall*, 20 Wend., 201; *Jackson* v. *Rayner*, 12 Johns. R., 291; *Kingsley* v. *Balcome*, 4 Barb. S. C. R., 131.)

2. The fact that the promise arises out of a new consideration, will not take the case out of the statute. (*Simpson* v. *Patten*, 4 Johns. R., 422; *Hall* v. *Farmer*, 5 Denio, 485, 496; *Stern* v. *Drinker*, 2 E. D. Smith, 402; *Barker* v. *Bucklin*, 2 Denio, 45.)

3. There was in fact no legal consideration for the promise.

1. The consideration was too indefinite—"if defendant would allow plaintiff to remain." How long? One year, or one day? (*Comyn on Conts.*, 2; 1 Sid., 270; 1 Keb., 776.)

2. The defendant was in lawful possession, and was entitled to hold till dispossessed by legal process.

4. At most the consideration was forbearance to take legal proceedings, and this consideration will not take a case out of the statute. (Authorities above cited, and *Watson* v. *Randall*, 20 Wend., 204.)

Robert Benner, for the defendant (respondent).

The facts were clearly proved, and the Court will not disturb the judgment. (Grah. & Wat. on N. T., vol. 2, p. 634; *State* v. *Engle*, 1 Zab. R., 347; *Smith* v. *Kerr*, 1 Barb., 155.)

The exceptions to the special finding of the referee are unavailing. The referee is in place of a jury, and on questions of fact presumed to be right. (*Bacon* v. *Parker*, 12 Conn. R., 212; *Kincaird* v. *Turner*, 2 Gil., 618.)

Again, this is a trifling action, and unimportant in its results, and for that reason alone a new trial should not be granted.

(*Price* v. *Everitt*, 1 East., 583, *in notis*; 1 Johns. Cas., 255; 5 Johns. R., 137; 10 Johns. R., 447; 2 Cow., 479.)

By the Court—Hoffman, J. By whatever rule the referee proceeded in his estimate, it is indisputable that he included the arrears due by the son with the value, at the rate of the lease, of the father's occupation. It is clear that he did not mean to estimate the actual occupation as worth $145.14, as if there had been no arrears.

The answer alleges, by way of counterclaim, an indebtedness of the plaintiff to the defendant, in at least $150, for the use and occupation of the store, and as the tenant and lessee of the defendant. The referee follows this allegation in his finding.

He does not find that the value of the plaintiff's occupation, for the period of his enjoyment, was $145.14; but he finds that the plaintiff owes the defendant that sum for the use and occupation of the store, and as tenant and lessee of his premises.

Now, the only evidence on which the finding rests as to the arrears, is this: an admission "that he had agreed that if Moller would allow him to remain, he would pay the back rent due by his son." The same witness, on cross-examination, says: "That the plaintiff admitted more than once that he had made a verbal agreement to pay the back rent of his son."

If this evidence were sufficient to charge the plaintiff, it would equally define the extent of his liability, and would exclude a responsibility for his own occupation besides, and make the sum to be paid for the privilege of remaining, only the back rent.

When the referee finds that $145.14 was due from the plaintiff, *for use and occupation, and as tenant and lessee*, he finds a fact, and fixes a price totally against the evidence. All the testimony to fix such value was the lease and nothing could be charged on this basis but for the period of say six weeks, at the rate of the rent therein fixed.

The case must be considered upon the evidence and finding thus: First, that the plaintiff verbally agreed that if the defendant would permit him to occupy the premises, (for a time not fixed but to accomplish the object of a sale,) he would pay the rent then due by his son: Next that he is chargeable, for his own actual use and occupation, with another amount ascertained to be its value.

If there was no question in the cause arising out of the plaintiff's occupation of the premises, the case would be very clear. The statute of frauds would undoubtedly apply. The debt of John H. Fowler for the rent, remained as absolutely due after the promise of the plaintiff to pay it as if no word respecting it had been uttered. It was a collateral undertaking for John H. Fowler's debt and nothing else. (*Eastwood* v. *Kenyon*, 11 Adol. & Ellis, 438; *Johnson* v. *Gilbert*, 4 Hill, 178; *Brown* v. *Curtiss*, 2 Comst., 225; *Mallory* v. *Gillett*, 23 Barb., 610; *Lord Lexington* v. *Clark and wife*, 2 Vent., 223.)

But it is said, that the plaintiff engaged to pay for his own occupation, and also for the value of that of his son previously had; and that the good promise upon the valid consideration for himself extends to the whole contract and takes the case out of the statute.

So far from this being the result, there is much authority for holding, that if part of a contract is void as being within the statute of frauds, the whole is void, although an independent portion of it might have been valid, had it stood alone. (*Van Alstyne* v. *Wimple*, 5 Cow., 162; *Lord Lexington* v. *Clark and wife*, 2 Ventr., 223, there cited.)

In this last case, Brady was tenant at will of the plaintiff at a rent of £320. He died, and his widow while sole, (now wife of defendant Clark,) in consideration of the plaintiff's allowing her to remain till Lady Day next, promised to pay £160 rent in arrear, and £260 more. The £160 was paid before suit was brought, and it was held, that this part of the agreement being void, as it was to pay the debt of another, and not in writing, the residue was void also, although, had it stood by itself, it might have been enforced.

Modern decisions, appear, however, to countenance a different rule, and to sustain the valid portion of a contract wherever it is separable from that part which is void, and to nullify only that which is illegal. (*Wood* v. *Benson*, 2 Cromp. & Jer., 94; *Rand* v. *Mather*, 11 Cush., 1.) The former is exactly in point. Part of a contract was void being to pay the debt of another, and part good as the promiser's own debt. It was supported *pro tanto*.

In *Rand* v. *Mather*, the subject was fully examined, and the general tendency of modern cases, to support such portions of

instruments as are legal, and reject the residue was noticed. To the authorities cited may be added the important one of *Curtis* v. *Leavitt*. (15 N. Y. R., 124.)

The judgment must be reversed, and a new trial ordered, costs to abide the event.

Ordered accordingly.

LUTHER WILSON, Plaintiff and Appellant, *v.* HENRY NASON, Defendant and Respondent.

1. H. M. was engaged in buying and selling wheat on his own account at Oswego, and also in receiving wheat and shipping it for other parties. In the summer and fall of 1851, the plaintiff bought and sent to him several thousand bushels of wheat which the plaintiff had as a commission merchant purchased for him, and the plaintiff also sent him a large quantity to be forwarded for himself. In October, 1851, the plaintiff being the owner of about 6,000 bushels, shipped it on Lake Ontario, by lake boats, consigned to M. T. & Co., Troy, New York, care of H. M. at Oswego, and so expressed in the bill of lading; the wheat to be forwarded by the latter by canal boats to Troy. H. M., at Oswego, received the wheat and forwarded all but about 730 bushels which he deposited in a bin to await a suitable opportunity for forwarding. He also deposited other wheat of the same description and quality, belonging to other parties, in the same bin. H. M. thereafter forwarded to New York, out of the said bin, the full quantity of wheat belonging to other parties, and finding a residue of about 722 bushels remaining in the bin, and believing at the time that it belonged to himself, he shipped that residue in bulk, and mixed with 984 bushels belonging to such other parties, to the defendant, a commission merchant, in New York, and drew bills of exchange on the defendant in the same manner as he had from time to time previously sent other wheat owned by himself. The defendant, acting in good faith and believing it to be the property of H. M., received the wheat, accepted and paid the bills so drawn, and sold the wheat. On an examination of the account of wheat received by H. M. from the plaintiff, it was discovered that H. M. had not forwarded to M. T. & Co. so much as he had received by 730 bushels, and he thereupon gave to the plaintiff an order on the defendant for the proceeds of the 722 bushels. The plaintiff demanded from the defendant the 722 bushels, and also demanded the proceeds thereof, and the defendant refused to deliver the wheat or pay over the proceeds, claiming a right to retain such

proceeds in reimbursement of his advances to H. M. *Held*, that the plaintiff was entitled to recover from the defendant the value of the wheat; that H. M. could give to the defendant no title; that the plaintiff having conferred upon H. M. no authority to sell the wheat, his mere possession was no protection to the defendant; that inasmuch as the documentary evidence of title (to wit, the bill of lading,) which the plaintiff intrusted to H. M. showed on its face that the latter was not the owner, the statute relating to sales by factors furnished no protection to the defendant.

2. *Held, also*, that the fact that H. M. had previously mixed the plaintiff's wheat with the wheat of other parties placed in the same bin did not so destroy its identity that after the quantity owned by others had been removed, the plaintiff might not claim the residue and pursue it as his own.
3. A sale of the owner's wheat by one who has the possession thereof for the mere purpose of shipping it to the owner's consignee is void as against the owner and passes no title, although the vendor sells it innocently, believing it to be his own and the purchaser receives it in good faith in the like belief and pays value therefor. A commission merchant receiving and making advances on the wheat stands in no better position.
4. Where one who has possession of the owner's wheat mixes it with other wheat of the same description and quality, (whether his own or belonging to third persons,) without the consent of the owner, the latter does not lose the title to his wheat; he may call for a division, or when the other parties have received from the mass their several quantities he may claim and recover the residue as his separate parcel. Identification of the very grains of wheat is not necessary.

(Before Bosworth, Ch. J., Hoffman and Moncrief, J. J.)

Heard, January 12th; decided, February 12th, 1859.

This case was heard at the General Term after a judgment dismissing the complaint, and giving costs to the defendant, was ordered at the trial, the Court directing that the case be heard on the exceptions at a General Term of the Court, with a stay of proceedings to enforce such judgment, until the General Term had passed upon the same.

The action was tried before Mr. Justice Pierrepont and a jury, on the 12th of October, 1858. No exception was taken on the part of the plaintiff to any ruling during the progress of the trial. When both parties had closed, a motion to dismiss the complaint was made, on the ground that upon the evidence the plaintiff was not entitled to recover; but the defendant was entitled, as matter of law, to judgment, (there being no question of fact in dispute.) The complaint was thereupon dismissed, and the plaintiff duly excepted to the decision.

The action was to recover the value of 740 bushels of wheat. It was alleged that the defendant, sometime in October or November, 1851, became possessed of the same at the city of New York; that in January, 1852, the plaintiff demanded of the defendant to return said wheat, or that he pay him the value thereof, which the defendant refused to do. The defendant denied that he ever obtained possession of any wheat belonging to the plaintiff; and denied that the plaintiff ever demanded of him such wheat as is mentioned in the complaint.

The plaintiff, in 1851, was a merchant and miller in Niagara county. He bought grain on his own account, and also on commission, and forwarded it in his own vessels to consignees at the east. He had dealings with one Mathews, a buyer, seller and shipper of produce, at Oswego. From September, 1850, on to the fall of 1851, the plaintiff, as a commission merchant and agent for Mathews, bought wheat to the extent of $40,000 or $50,000, and shipped it in his (plaintiff's) own vessels, to Mathews, who paid his commissions. These transactions were for account of Mathews.

The plaintiff, in August, September, and October, 1851, shipped 12,395 bushels of wheat belonging to himself, to Moore, Tibbets & Co., Troy, *via* Oswego, in five separate shipments; and in the bills of lading on board the lake boats on which it was transported to Oswego, the shipment purported to be by the plaintiff, to Moore, Tibbets & Co., at Troy, and the bills were underwritten to the "care of H. Mathews, Oswego," and the bills were forwarded by the plaintiff to Mathews.

As to these five shipments, Mathews acted as receiving and shipping agent for the plaintiff to tranship the wheat from lake boats to canal boats. His duty was to ship the wheat to Moore, Tibbets & Co. It was a part of his business to receive wheat and pay the lake freights, and forward the same to its destination, and he did so receive and forward large quantities, and for doing so he charged the owners half a cent per bushel.

Mathews was a large buyer of wheat, both of plaintiff and others. He was not a warehouseman or carrier. He had no warehouse, but hired a bin in a warehouse owned by another man, in which he deposited, indiscriminately, Genesee and Niagara wheat belonging to himself, and also parts of shipments

received by him from the plaintiff and three other parties, viz., Wright & Outwater, Doyle & Emerson, and Nelson Cornell, for transhipment, while it awaited a suitable opportunity for forwarding the same.

During October, 1851, Mathews had received wheat from the plaintiff and the other parties above named, and also for himself; part he transhipped immediately, part he mixed in the bin, and from the bin made shipments to suit his convenience for each of the parties, and for himself. He finally cleared out the bin about the 22d and 23d of October, by shipments to L. Bulkley & Co., of New York, on account of Cornell; to Jones, Himrod & Titus, of New York, on account of Doyle & Emerson; to the same, on account of Wright & Outwater; and to defendant, on his own (Mathews') account. The quantity belonging to Wright & Outwater was 984 bushels; this he shipped to Jones, Himrod & Titus, of New York, by the boat "Honest Farmer," and sent to them the bill of lading. There then remained in the bin 722 bushels, and this he put on board the same boat in bulk, mixed with the 984 bushels, consigned it to the defendant and sent him the bill of lading, believing at the time that the 722 bushels belonged to himself, while in truth he had received, of the wheat of the plaintiff which it was his duty to forward, about 730 more bushels than he had forwarded for him to Moore, Tibbets & Co., and these 730 bushels he had placed in the bin. But through oversight, not discovering that any of the plaintiff's wheat had not been forwarded, he supposed it to belong to himself, and he shipped it to the defendant for sale on commission, as had been his habit for several years. His transactions with the defendant of this nature, between April and November, 1851, were $43,813. The defendant was in the habit of making advances on Mathews' shipments on receipt of the bills of lading; sometimes Mathews would draw against particular shipments, sometimes generally. After this shipment he drew four drafts on the defendant, amounting to $5,060, all of which were accepted by the defendant, and paid before the latter had any notice of the plaintiff's claims. These drafts were made on general account.

These drafts were accepted and paid on the faith and on account of the bill of lading for the 722 bushels, as well as other shipments to the defendant.

Notice was given by the defendant to Mathews, that the wheat was sold and the proceeds passed to his credit.

This shipment was taken into accouht by the defendant in accepting Mathews' drafts, and in ascertaining the state of Mathews' account, and it appeared that upon giving credit to Mathews for the proceeds of that shipment, and charging the drafts paid, the defendant did not owe him anything.

The defendant had no notice, at any time during the transaction, that Mathews was not the actual owner of the wheat. The plaintiff subsequently called on Mathews, and on examination it was discovered that about 730 bushels of the plaintiff's wheat, (which had been placed in the bin,) had not been forwarded to Moore, Tibbets & Co., and that this deficiency in the plaintiff's wheat, therefore, constituted the residue which was in the bin after the requisite quantity had been removed belonging to others, and which Mathews, under the mistaken belief that it was his own, had shipped to the defendant.

Mathews, therefore, gave the plaintiff an order on the defendant for the proceeds of the 722 bushels, and accompanied it with a note explaining the circumstances. The plaintiff presented the order and demanded the proceeds, but the defendant refused to pay them. The plaintiff also demanded the 722 bushels of wheat, but the defendant refused to recognize the plaintiff as having any interest therein. The defendant having in good faith accepted and paid on the faith of the consignment by Mathews to himself, believing that the wheat belonged to Mathews, retained and claimed to hold the proceeds of the 722 bushels in reimbursement of his advances.

It further appeared on the trial that on the arrival of the boat "Honest Farmer" in New York, the whole of the wheat, (*i. e.*, the 984 bushels consigned to Jones, Himrod & Titus, for account of Wright & Outwater; and the 722 consigned to the defendant) was sold in bulk by Jones, Himrod & Titus, they acting in behalf of the defendant in respect to the 722 bushels, and paying over to the defendant the proceeds thereof.

[Upon a former trial of the action before a referee, he ordered judgment for the plaintiff; but on appeal to the General Term the judgment was reversed and a new trial ordered, as stated in the opinion of the Court.]

Homer H. Stuart, for the plaintiff, insisted that the plaintiff owned the 722 bushels of wheat in controversy, so long as it remained in the possession of Mathews; and that the defendant did not acquire the title as against the plaintiff.

That the mixing of the plaintiff's wheat by Mathews, for a temporary purpose, with other wheat of a like description and quality did not affect the plaintiff's title.

That the plaintiff was still entitled to his specific quantity from the bin.

That the subsequent withdrawal from the bin of the quantity due to others was an actual separation, and the residue belonged to the plaintiff.

On the day of sending this wheat, Mathews had in his possession, as warehouseman, forwarder or bailee, 984 bushels belonging to Wright, and 722 belonging to plaintiff. He had no authority from either to intermix or do any act, except to forward. He could not transfer title in either parcel from one owner to the other, or to himself, or to a stranger. If, from carelessness in the management of his business, he could not readily ascertain who owned the 722 bushels, and assumed that he owned it himself, because it remained in his possession after each of his bailors had, as he supposed, received all the wheat belonging to him, this mistake could not divest the owner of his title, and transfer it to Mathews. While the wheat remained in Mathews' hands, no act of Mathews, not authorized by the plaintiff, could transfer the plaintiff's title. The 722 bushels were part of the 12,395. Mathews could not sell part to defendant, unless he could sell the whole.

But the law is well settled, that mixing wheat of the same kind, belonging to different owners, does not affect their individual rights.

Story on Bailments, section 40, states the law thus:

"It the goods are of the same nature and value, and although not capable of an actual separation by identifying each particle, yet if a division can be made of equal value, (as in the case of a mixture of corn, or coffee, or tea, or wine of the same kind and quality,) then each may claim his aliquot part."

The cases embrace nearly every variety of transactions. The mixing was made with consent and without consent of owners; was done for the purpose of storage, of carriage, and of manu-

facture. The common question in all the cases, was, whether the transaction amounted to a change of title, or was a simple bailment, and the inquiry related entirely to the agreement of the parties on the subject, irrespective of the fact whether the wheat was mixed with other wheat. The Courts have uniformly held that each owner's wheat remains the identical thing deposited by him, notwithstanding its mixture. That the doctrine governing cases of confusion of goods, does not apply. (*Nowlen* v. *Colt*, 6 Hill R., 461; *Goodyear* v. *Ogden*, 4 id., 104; *Dawson* v. *Kittle*, id., 107; *Mallory* v. *Willis*, 4 Comst., 76.)

Whether a particular transaction amounts to a confusion of goods, and involves the consequences resulting from such cause, depends entirely upon the fact that a separation is impossible. Mixing the wine of A. with the vinegar or salt of B., undoubtedly makes a case of confusion of goods, and the wrongdoer, if he was the owner of one of the things thus mixed, loses his title.

If Mathews wrongfully mixed plaintiff's wheat with Mathews' wheat, and it caused a confusion of goods, the loss falls on Mathews. If the separate parcels could not be taken from the mass, then the whole would belong to plaintiff.

The remaining question is, did the defendant obtain a title to this wheat as against the plaintiff?

If it be conceded that Mathews was not the owner of the wheat, then he could not give title by a sale, unless he had authority express or implied, from the owner.

The defense interposed under the factor act cannot be sustained. The 6th section of the factor act especially excepts such a case as this from the statute, viz.:

"Nothing contained in this act shall authorize a common carrier, warehouseman, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same."

Mathews was such person, and acted as such, not only for plaintiff, but various other parties whom he names.

It is not necessary that the sole or even the greater part of a person's occupation should be that of such designated kind to bring him within the scope of that section. It is not alone a common carrier or warehouseman, but any person who has possession of property for transportation or storage.

The only ground on which defendant could claim that this statute applied, must be that plaintiff gave Mathews some bill of lading or other *indicia* of title, which on its face imported ownership in Mathews.

In the bill of lading which plaintiff sent to Mathews, plaintiff appeared to be the owner, and Moore, Tibbetts & Co., the consignees.

Mathews appeared, as he was in fact, a mere intermediary to effect the passage of the property from the consignor to the consignees.

Besides, the bills of lading which plaintiff gave Mathews were not shown to defendant, and he could not have acted "on the faith thereof."

The bill of lading sent by Mathews to the defendant, did not bring the case within the statute.

The statute never intended to authorize a mere possessor of personal property, not intrusted with it by the owner for the purpose of sale, to give a better title than he had, by making his transfer in the form of a bill of lading instead of a bill of sale. A thief who consigns stolen property, by giving a bill of lading of it to his consignees, does not change the owner's title. (*Stevens* v. *Wilson*, 3 Denio, 472; see same case in 6 Hill R., 512; *Covell* v. *Hill*, 2 Seld. R., 374; see reasoning of Judge BRONSON on the 1st section of factor act, in *Covill* v. *Hill*, 4 Denio, 329—foot of that page.)

The factor act excludes this case, and it must stand on the old common law ground. (*Saltus* v. *Everett*, 20 Wend. R., 267, 279.)

"The doctrine that possession is the evidence of property, so as to protect a person acquiring the property in the usual course of trade, is limited to cash, bank bills, and bills payable to bearer." (Id., 279; *Covill* v. *Hill*, 4 Denio R., 323.)

Wm. Allen Butler, for the defendant.

I. There was no evidence in the case to sustain the allegation of the complaint that defendant obtained possession of *wheat which belonged to the plaintiff.*

1. There was no attempt to identify the 722 bushels claimed, as wheat originally shipped by plaintiff.

2. The evidence showed that portions of all the wheat received by Mathews, as owner or agent, were intermixed in one bin, and that out of this bin he made shipments to suit his convenience. There was thus a total confusion of the property of different owners, and it is impossible to say what became of the 730 bushels, which, on the final settlement between Mathews and plaintiff, was found to be deficient.

3. On this state of facts, supposing that Mathews was liable to the plaintiff for the unauthorized mixture to the extent of the value of the deficiency, there could be no liability on the part of the defendant in this action of trover. By the mixture, as proved, the means of identification were destroyed, and plaintiff's wheat could not be distinguished. (See *Goodyear* v. *Ogden*, 4 Hill, 104.)

He has failed to show any title in the wheat. (*Jackson* v. *Hale*, 14 How. S. C. R., 515; *Cobb* v. *Dows*, 9 Barb., 230; see pp. 242, 244.)

There was no conversion by defendant any more than by any other recipient (except Moore, Tibbets & Co.) of wheat taken from that bin.

Conceding the rule to be that in some cases of unauthorized confusion of property the party injured by the intermixture may pursue the whole mass, if not broken, (see *Nowlen* v. *Colt*, 6 Hill, 461,) it does not follow that he could pursue separate portions of it, unless identified as his own. The reason of the rule excludes any such conclusion; for it proceeds upon the assumption that the whole must include the part to which the original owner was entitled, but this cannot be predicated of any separate portion.

There was no more reason for selecting the last shipment than the first; nor any more reason for his selecting the 722 bushels claimed of Nason, than a like quantity out of the 984 bushels shipped by the same boat to Jones, Himrod & Titus; or a like quantity out of previous shipments to other parties.

The evidence shows that there never was, in fact, any delivery of 722 bushels to defendant. And the action must fail for want of proof that he became possessed of the property. The mere receipt by him of the proceeds of 722 bushels out of the 1,706 shipped by the "Honest Farmer," does not establish any liability on his part.

II. The plaintiff, by the course of his dealings with Mathews, conferred upon him the apparent right of disposal of all wheat shipped to him by plaintiff. Out of shipments made by plaintiff to amount of 50,000 or 60,000 bushels ($40,000 to $50,000 in value) only 12,000 or 13,000 bushels (about $9,000 in value) were shipped by plaintiff as owner. Mathews, not being known to plaintiff or defendant, or to the world, as a common carrier or warehouseman, the defendant should be protected, in the absence of any fraud or unfair dealing, or of any notice to defendant that this wheat was excepted from the ordinary course of dealing between plaintiff and Mathews.

1st. A *bona fide* purchaser, in the usual course of trade, is entitled to retain the goods, even as against the original owner, where such owner, by his own act, confers upon the intermediate vendor the possession with an apparent power of disposition. (*Saltus* v. *Everett*, Opinion of Verplanck, Senator, 20 Wend., 279, 281.)

2d. Even when the intermediate party is a wrongdoer, the loss is made to fall upon the original owner who enabled him to do the wrong rather than on the innocent purchaser, in cases where the vendee was misled by appearances created by the owner. (*Haggerty* v. *Palmer*, 6 John. Ch., 437; *Root* v. *French*, 13 Wend., 570; *Covill* v. *Hill*, Opinion of Bronson, 4 Denio, 328.)

3d. In this case Mathews supposed the wheat to belong to himself, and there was no fraudulent intent in the shipment by him to defendant. The plaintiff knew that Mathews was a buyer and seller of grain, and that he was not known as carrier or warehouseman. He assumed the risk consequent on not transmitting his grain through a known carrier or warehouseman, but sending it, for convenience, to a person who was known to be a buyer on his own account. The defendant only knew Mathews as a buyer and seller, and had so known him for a long time. From the nature of his business he had a right to imply that Mathews owned the wheat. His advances were made in good faith without the slightest suspicion of the plaintiff's interest. The principle stated above should therefore be applied to this case. (*Pickering* v. *Busk*, 15 East., 44.)

III. The defendant is protected under the statute relating to principals and factors. (Laws of 1830, ch. 179; 2 R. S., 4th ed., 184.)

1. The wheat was shipped by Mathews to defendant in his own name, and he is to be deemed the true owner thereof, so far as to entitle defendant to a lien for his advances, the same having been made in good faith and without notice by the bill of lading, or otherwise, that any person had or claimed any interest therein. (Id., §§ 1 and 2.)

2. The exceptions contained in section 6 do not apply.

(1.) Mathews was not a common carrier, warehouseman or forwarder, within the true meaning and construction of the 6th section.

(2.) There is no evidence that the 722 bushels of wheat in question were committed to him for transportation or storage.

(3.) Even if Mathews had no authority to do more than consign the 12,395 bushels received by him from plaintiff to Moore, Tibbets & Co., at Troy, yet, as between plaintiff and defendant, Mathews is to be deemed the owner, he having authority by the terms of the bill of lading and by the course of his business with plaintiff, to make new shipments in his own name.

(4.) The case of *Covill* v. *Hill*, (4 Denio, 323; *S. C.*, 2 Seld., 374,) is not in point. In that case, (a.) There was no bill of lading. (b.) The defendants had full notice of the ownership of the property. (c.) There was no evidence of any advances made by the purchaser.

BY THE COURT—HOFFMAN, J. This cause was heretofore before the General Term of the Court, in July, 1854, upon a report of a referee. Mr. Justice CAMPBELL, who delivered the opinion of the Court, and the late Chief Justice DUER, concurred in holding that the defendants were protected under the provisions of the statute of 1830, relating to factors. Justice DUER expressed no other opinion.

Mr. Justice BOSWORTH, who also heard the case, stated, on the argument of this appeal, that he dissented from that conclusion, although he did not write a dissenting opinion, and that Mr. Justice DUER concluded not to report the case.

The case, as affected by the factor's act, appears to be this: The owner of wheat, living in Niagara county, New York, ships it to a house in Troy, by a bill of lading providing for a delivery to that house. But the transportation is to be effected, partly in

lake vessels to Oswego, and from thence by canal boats to Troy. A transhipment at Oswego was therefore necessary, and Mathews was employed as the agent for a commission, to superintend and effect this. The course of business required that in some instances the wheat should be deposited at Oswego, until canal boats were ready to carry it forward. The bill of lading was therefore also indorsed, "care H. Mathews, Oswego." In the present case, he did get possession of the wheat, so as to deposit it in his own bin, in common with his own, or the wheat of others. He was merely a shipping and receiving agent, his duty being to pay lake freights, &c., and forward the property.

Since this case was before the General Term, the factor's act has received an elaborate consideration and analysis by the late Chief Justice DUER, and we apprehend that the principles he then declared, and which the Court sustained, would lead him to a different conclusion from the one he assented to in the present instance. (*Bonito* v. *Mosquera*, 2 Bosw., 401; see, also, *Cook* v. *Adams*, 1 Bosw., 497.)

Mathews was not a factor or agent entrusted with the possession of either one of the documents enumerated in the act "relative to principals, and factors or agents." (1 R. S., 774.)

On the document he possessed, it would appear that he was not the owner; the document was not delivered to the defendant, nor exhibited to him. Nor was the possession given to Mathews for the purpose of sale, or as security for advances to be made on the property. Besides, the 6th section appears to admit of a construction decisive against this position.

We do not think that if the plaintiff was the true owner of the wheat in question, the defendant can be protected by virtue of this statute. It becomes necessary, therefore, to consider the other grounds on which Mr. Justice CAMPBELL rested the decision, and the other points relied upon by the plaintiff.

And in the first place, we think that the identity of the wheat which belonged to the plaintiff with that which came to the control, and its proceeds to the hands of the defendant, is sufficiently established. We trace 3,200 bushels of wheat into the bin and there remaining on the 14th of October. On the 23d, all that remained was shipped; 984 bushels definitely belonging to Wright & Outwater, and 722 belonging to the plaintiff; so

belonging because Mathews did not own them, and not a shadow of title appears in any one else.

Mathews was clearly responsible in an action of replevin for this wheat. So were Jones, Himrod & Titus, who sold it, in trover. If the wheat of two persons is mixed together, with their knowledge and consent, and either carries away and disposes of the whole, an action of trover may be maintained against him. (*Nowlen* v. *Colt*, 6 Hill, 461.)

The case of *Mallory* v. *Willis*, (4 Comst., 76,) shows, that where the arrangement between the parties amounts to a bailment of wheat, the plaintiff can sustain replevin for a portion of the wheat manufactured into flour.

And in *Silsbury* v. *McCoon*, (3 Comst., 379,) the law on the subject is fully examined. Corn was taken from the owner by a willful trespasser, and converted into whiskey. It was *held*, that the property was not changed, and the whiskey belonged to the owner of the corn, and trover was supported.

Through all the niceties of distinction which we find among the civilians, upon the subject of accession or commixion, we trace the principle almost invariably respected, that if the article retains substantially its original form and nature, the privilege of reclaiming it exists. *Si mutatio perimit priorem speciem, et parit novam*, is the inquiry. (*Leges apud Troplong Droit Civile*, *tome* 1, *n.*, 111.)

M. TOUILLIER, in treating of the "mixture or confusion of things belonging to several owners," states that if they can be separated, he who was ignorant of the mixture may demand a division, or he may demand the price. If they cannot be separated without inconvenience, the ownership is in common, in the proportion of the quantity, quality and value belonging to each. Wherever the right of reclaiming property exists, the owner may demand restitution of the article, in the same nature, weight, measure and goodness; or may have its value, at his election. (*Le Droit Civile Française*, *tome* 3, p. 64.)

Such is the law, as stated by Justice STORY (on Bailments, § 40); and by Blackstone. (2 Com., *note*, 404, 405.) See, also, *Ryder* v. *Hathaway*, (21 Pick., 298;) and *Pratt* v. *Bryant*. (20 Vt. R., 333.)

It is therefore, I apprehend, sufficiently clear that the mixture of the wheat of the plaintiff with that of other parties in the bin

of Mathews, in no way affected the property of the plaintiff in 722 bushels of wheat, and that there is no difficulty in saying that the 722 bushels consigned to the defendant included the wheat of the plaintiff; that the identity is sufficiently traced and marked.

In this view, the property of the plaintiff, without his consent, contrary to the destination he had given it, without authority given by him to any one to alter that destination, came into the hands of the defendant. It came there through an act of an agent without power in this particular, and which act, in sending this wheat to New York, was in legal acceptation, tortious. The defendant is also to be considered as having accepted and paid drafts on the credit of this wheat, in common with other shipments.

I apprehend, however, that the law is settled in favor of the original owner, thus wrongfully deprived of his property, even against an innocent purchaser. (*Silsbury* v. *McCoon*, 3 Comst., 379; *Saltus* v. *Everett*, 20 Wend., 267; *Covell* v. *Hill*, 4 Denio, 323, and 2 Seld., 374; *Cobb* v. *Dows*, 9 Barb., 230; and *Cook* v. *Adams*, *supra*.)

These authorities, with those late cases relating to bills of lading and certificates of stock, not only declare and renew the doctrine of the common law, that the title of an owner shall not be divested without his act or consent, but narrow and restrict those exceptions which the exigencies of a mercantile community have required, or its peculiar views have suggested.

The case seems merely this. The owner of goods has employed an intermediate agent only to forward them to their destination. Necessity or convenience places the property temporarily in that agent's possession; he has no authority to sell or pledge; he is not entrusted with any of the documents of apparent ownership. He wrongfully appropriates the goods, and an honest purchaser obtains them from him. The original property and right of the owner are not divested. His power to reclaim the goods or their avails is not lost.

I think there was error in dismissing the complaint, and that there must be a new trial, with costs to abide the event.

Ordered accordingly.

WILLIAM RIDER and JONATHAN TROTTER, as Assignees of Goodyear and Ely, Plaintiffs and Respondents, *v.* THE UNION INDIA RUBBER COMPANY, Defendants and Appellants.

1. In an action against a corporation by R. and T., to recover the value of tools and machinery belonging to themselves, and the value of the use thereof; which tools and machinery have by such use been worn out and rendered valueless, it is competent for the defendant to show as a defense, that the plaintiffs were officers of the defendants, and authorized by the defendants to purchase from a third party all his tools and machinery used by him in his manufactory for $30,000. That such purchase was made by the plaintiffs, the tools and machinery in question being then set up in the factory. That the defendants, with the concurrence of the plaintiffs, acting as defendants' officers, paid the money, took possession of the factory and of all the tools and machinery therein, and used the same, believing the whole to be included in the said purchase.
2. In such case the production of a judgment record in evidence which showed that the plaintiffs had once brought an action against the defendants, alleging a sale by themselves to the defendants of the same tools and machinery, and claiming the price; in which the defendants denied any purchase from the plaintiffs; and in which it was found as a fact that the defendants did not purchase the property from the plaintiffs, and judgment for the defendants was pronounced, does not preclude such defense, and it is error to exclude evidence of a purchase by the defendants from such third person.
3. One who stands by and acquiesces in a sale of his own property by a third person claining to own it, and suffers the purchaser to pay the price, without notice, is estopped thereby to assert title in himself and claim the property or its value.
4. One who uses the property of another with his assent, is liable for the fair value of such use; but the statute of limitations is a bar to any recovery for that portion of the period of use which is more than six years before action brought.
5. Where, by such use for eight years, the articles are worn out and rendered valueless, it is error to charge the jury that the plaintiff is entitled to recover what the articles were worth when they came to the defendants' possession.
6. It may be a just presumption that the use of articles voluntarily procured and used, and worn out, is worth at least the ordinary depreciation of such articles by the use thereof; but such presumption is not conclusive, and will not warrant a charge that as matter of law the plaintiff is entitled to the value of the articles as compensation for the use thereof.
7. On the denial of a motion for a new trial at Special Term, if no appeal be taken from the order, the moving party will be deemed to acquiesce in the

propriety of such denial, and to have waived all grounds for a new trial, except such questions of law as under exceptions taken at the trial may be reviewed on an appeal from the judgment itself; and on appeal from a judgment such exceptions will alone be considered.

(Before SLOSSON, WOODRUFF and PIERREPONT, J. J.)

Heard, October 4th, 1858; decided, February 19, 1859.

THIS action came before the Court in General Term on an appeal by the defendants from a judgment entered upon a verdict in favor of the plaintiffs for $866.75.

The complaint herein alleges that the defendants had and used certain machinery, &c., belonging to the plaintiffs as assignees of Goodyear & Ely, from November 1st, 1848, to October 1st, 1855, which articles were worth $824.

That the said property, or the largest part thereof, has been consumed or rendered worthless during the time the defendants had and used the same.

That the use of the said property by the defendants was worth the sum of $1,000.

That on or about the 1st of September, 1855, the plaintiffs demanded a return of the property, and the defendants neglected or were unable to return the same, or but a small part thereof, the same then being of the value of $200.

That the defendants have purchased and paid for certain articles parcel of the said property, which, at the time of such demand, were of the value of $30, for which the defendants are entitled to a credit.

The answer, so far as it is material to state its contents, sets up a purchase of the property in question from the firm of William Rider & Brothers, in pursuance of a resolution of the Company of November 15th, 1848, by which the plaintiff Trotter, (then being the defendants' President,) was directed to purchase all their machinery, tools, steam curers, boilers, engines, and other fixtures used by them * * for the sum of $30,000. That such purchase was made on the 4th day of December, 1848, and embraced the articles mentioned in the complaint. That the plaintiff Trotter was then President of the Company, and the plaintiff Rider was their Treasurer. That by the by-laws of the Company it was the duty of the President to make all purchases for the defendants, and it was required by

such by-laws that all business done by any officer should be entered in the books of the Company. That the purchase so made by the plaintiff Trotter, in pursuance of such resolution was duly entered in the books of the Company, and that the defendants have never had nor used the property in any other manner than as the purchasers thereof. And also, that at the time of such purchase the defendants took possession of all the personal property then used by the said Rider & Brothers, with the consent of the said Rider & Brothers, and of the said plaintiffs, as purchasers, and believing that they (the defendants) were such purchasers; and that the property continued to be used by the said plaintiffs while they were the acting officers of the Company and connected therewith; and that on or about the 1st day of October, 1855, the plaintiffs first claimed the articles mentioned in the complaint as their property, and that the same had not been sold to the defendants; and that the defendants, after averring that all the property thus claimed had been purchased by them, permitted the plaintiffs to take whatever property they claimed and found in the defendants' possession, and the plaintiffs claimed and took six tables only and disposed of the same.

And finally the answer sets up the statute of limitations.

The action was commenced on or about the 10th of October, 1856, and was tried before Mr. Justice SLOSSON, and a jury, on the 22d day of March, 1858.

On the trial the plaintiffs gave evidence tending to show that before the incorporation of the defendants, William Rider & Brothers were carrying on the business of manufacturing india rubber goods, at a manufactory at Harlem, and had also a warehouse in this city. That in the same building at Harlem, a firm of Goodyear & Ely had also manufactured goods, but had failed and made an assignment to the plaintiffs. That the machinery, &c., mentioned in the complaint had belonged to Goodyear & Ely, and passed to the plaintiffs under the assignment, but it remained in the manufactory at Harlem occupied by Rider & Brothers; and there was evidence that it was of the same description of machinery, &c., as the machinery, tools, &c., which confessedly belonged to Rider & Brothers, and that it was used by the last named firm, and was in such use when the defendants were incorporated.

That upon such incorporation, in September, 1848, the plaintiffs, (being then such assignees of Goodyear & Ely,) became President and Treasurer of the defendants. That the firm of Rider & Brothers, upon the organization of the defendants, sold out to them, and in November, 1848, the defendants took possession of the manufactory, and of all the machinery, tools, fixtures, &c., there, and commenced manufacturing, and "went on and used" the articles which had belonged to Goodyear & Ely.

The defendants in this stage of the trial, on the cross-examination of the plaintiffs' witness, stated that they proposed to prove that the defendants had purchased the articles mentioned in the complaint, and thereupon the plaintiffs introduced in evidence a judgment record in an action commenced by the present plaintiffs against the present defendants on or about the 2d day of October, 1854, brought to recover upon an allegation of the sale and delivery of the same articles to which this suit relates, by the plaintiffs as assignees of Goodyear & Ely, to the defendants. The answer, in which action, denied that the plaintiffs sold the goods, &c., to the defendants. The issue thus formed was referred, and the referee reported that the plaintiffs did not sell and deliver these goods to the defendants. Judgment was entered on the report on the 2d of August, 1855, and it was thereby adjudged that the plaintiffs did not sell and deliver to the defendants the goods and property so mentioned.

After the reading of the said judgment record, the Court (in reference to the defendants' proposal to prove that they had purchased the articles in question), held that, as between the parties to this suit, the question of title to the said articles as purchasers, had been passed upon, and that the defendants could not now claim as purchasers.

To this ruling the defendants' counsel excepted.

A resolution of the defendants, passed on the 15th of November, 1848, was given in evidence by them, directing the President, Mr. Trotter, (one of the present plaintiffs,) to purchase for the defendants, from William Rider & Brothers, "all their machinery, tools, steam curers, boilers, engines, dry curer and other fixtures, *used by them* in and about their rubber manufactory at

Harlem, (except the moulds for curing balls,) together with their lease of the factory and houses, for the sum of $30,000."

Evidence was given tending to show that it was the intention of the plaintiffs to sell these articles in question to the defendants, and that they were left in the defendants' possession; but Trotter & Rider, the plaintiffs, both testified that the articles were not in fact included in the sale made under that resolution, and they were corroborated by other witnesses, one of whom says that the "company were to buy them." It was also testified that Trotter, before the incorporation of the defendants, was at the manufactory, and the articles which had belonged to Goodyear & Ely were pointed out to him. But the articles in question remained in the same rooms with the other machinery, and they all went into the actual possession and use of the defendants when possession of the manufactory was delivered to them, and there was no evidence that any person connected with the company, except Trotter and the Messrs. Rider, had any knowledge that the whole of the machinery and property so delivered was not the property of Rider & Brothers, or that it was not purchased and paid for by the $30,000 appropriated by the said resolution.

It was admitted that the defendants continued to use the articles down to the fall of 1855, after the determination of the former suit, when the plaintiff, Trotter, demanded the articles at the manufactory, and the defendants' Secretary told him if he found any he could take them. He took certain tables, but the residue of the articles appear to have been either worn out or rendered worthless by long use.

There was evidence that the value of the goods, when the plaintiff received the possession, was, as was alleged in the complaint, $824. That the wear and tear of the article of chief value, a heater, by use, was ten per cent a year; and again the same witness stated that it would naturally wear out in five or six years by constant use; and besides that evidence, there was nothing to show what was the value of the use of the goods.

The defendants offered the by-laws of the Company, enacted October 3d, 1848, in evidence. They purported to have been passed at a meeting of the Trustees of the Company, at which

both of the present plaintiffs were present, acting as Trustees, and to have been unanimously adopted.

The Court rejected the evidence, and the defendants' counsel excepted. The presiding justice charged the jury,

1st. That "if the articles in question were intended by Rider & Trotter, assignees, to pass under the purchase of the articles in use by Rider & Brothers, under the Company's resolution of November, 1848, and were received, and have been used by the defendants as purchasers, supposing that they were purchasers, there then being no dispute that the $30,000 appropriated by that resolution had been paid, the defendants have not been in fault, and are not liable in this action."

2d. "If, on the contrary, the articles of Goodyear and Ely were at the time of the purchase discriminated from those of Rider & Brothers, and it was not the intention of the parties that they should pass under the general purchase, then the defendants have used them with the consent of the assignees, and not having the articles to respond to the demand for them, but having used them until they had become valueless, must answer for their value, or for the value of the use, in respect to which you will judge on the testimony."

3d. "The statute of limitations applies to all the period anterior to six years before the beginning of this suit."

"To which charge" (as the Case states) "the defendants' counsel did then and there except."

The defendants' counsel requested the judge to charge "that if the Company did, by their resolution, intend to and supposed they had bought all the property on the premises at Harlem, this action cannot be maintained."

The judge refused to charge otherwise than he had charged, and the defendants' counsel excepted.

The jury found a verdict for the plaintiff for $866.75.

The defendants moved at the Special Term for a new trial, which was refused.

From the judgment entered upon the verdict, the defendants appealed.

A. Thompson, for the appellants.

John T. Hoffman, for the respondents.

BY THE COURT—WOODRUFF, J. This case being now before us on appeal from the judgment only, we have only to consider the exceptions which were duly taken at the trial.

The counsel for the appellants have made and argued some points relating to the sufficiency of the proofs, which, however proper on the motion for a new trial, are not open to consideration here as a ground of reversal. The defendants not having appealed from the order denying a new trial, must be taken to have acquiesced in the propriety of such denial, and therefore to have waived all grounds for a new trial, except such questions of law as, under the exceptions taken, may be raised on an appeal from the judgment.

The answer of the defendants distinctly averred, as a defense, that the property for the use whereof the action is brought, was in the possession and use of Messrs. Rider & Brothers, in October, November and December, 1848, when the defendants purchased from them all their machinery, tools, steam curers, &c., &c., used by them in their manufactory, for the sum of $30,000. That such purchase embraced all the articles in controversy here; that the plaintiff, Trotter, acted in such purchase as the defendants' President, and that the defendants took possession as purchasers, with the consent of the plaintiffs and Rider & Brothers, and in the belief that all of such articles were included in such purchase, and that the plaintiffs themselves, while acting officers of the defendants, until after January, 1852, used the articles in question. And the defendants deny that they have had or used any property named in the complaint, except as purchasers as aforesaid, with the knowledge and consent of the plaintiffs.

These facts, in substance, the defendants offered to prove on the trial; and the Court *held* that, as between the parties to this suit, the question of title had been passed upon in the former suit, and that the defendants could not now claim as purchasers.

And yet, the Court charged the jury, that if the articles in question were intended by Rider and Trotter, (assignees,) to pass under the purchase of the articles in use by Rider & Brothers, and they were received and used by the defendants, as purchasers, supposing they were purchasers, the defendants are not liable.

We are of opinion, that the principle of this direction to the jury is correct, and if there was no error in that direction, and

if the ruling of the Court, that "the defendants could not now claim as purchasers," is to be taken as an exclusion of evidence that the property was purchased by the defendants, from Rider & Brothers, and under circumstances which forbid these plaintiffs to set up title in themselves, *i. e.*, if it was an exclusion of evidence tending to prove the facts alleged in the defendants' answer, then it seems inevitable that the ruling that the defendants could not now claim as purchasers, was erroneous.

If Messrs. Trotter and Rider acted for the defendants, as their officers, in making a purchase of the property of Rider & Brothers, and included therein the articles in question; or, if they acquiesced in the payment of the $30,000 by the defendants, and consented to their taking possession and using the articles, under the belief that such articles were included in that purchase, then the plaintiffs, (Trotter and Rider,) are concluded. They are estopped to claim title in themselves, as assignees of Goodyear & Ely. To permit them to make such a claim would operate as a fraud upon the defendants, and this principle is substantially recognized in the charge. In this view of the transaction, the defendants acquired a title to the property which the plaintiffs cannot gainsay nor deny. The title was not, it is true, acquired by purchase from the plaintiffs, but it was acquired by purchase from Rider & Brothers, under circumstances which forbid the plaintiffs to allege that Rider & Brothers were not the owners.

The judgment record given in evidence by the plaintiffs was conclusive as between the parties, upon the question determined thereby, to wit: that the defendants had not purchased these articles from the plaintiffs.

But it did not in anywise prove that the defendants had not title to the property acquired by the purchase from Messrs. Rider & Brothers, under the circumstances above suggested. The defendants did not, in this action, claim by purchase from the plaintiffs, but only that they acquired title, as purchasers, by virtue of the transaction with Rider & Brothers, and the acts and consent of the plaintiffs in relation thereto. Although the record of the former judgment was a bar to proof of title by purchase from the plaintiffs, it did not preclude proof of title acquired in any other manner.

We think, therefore, that a rejection of evidence to prove that the defendants purchased the property, and a ruling that the question of title to the articles, as purchasers, had been passed upon so that the defendants coutd not now claim as purchasers, if understood to exclude proof of the facts set forth in the answer, was not only inconsistent with the charge, but was erroneous.

But on the other hand, it would seem, from some of the evidence which was afterwards given, that the ruling on the trial was understood at the time as merely excluding evidence of a purchase from the plaintiffs, and the Court did certainly submit to the jury the question whether the parties respectively did, at the time, intend that the articles should pass under the purchase from Rider & Brothers, and whether the defendants received the same as purchasers. As already observed, this is so inconsistent with the exclusion of any evidence of title in the defendants, as certainly to indicate that the judge himself did not intend any such exclusion, and to create great doubt whether he was so understood.

Counsel, on the argument of this appeal, differ entirely upon the construction of the ruling, and the points of the appellants assume that the defendants were not permitted to prove that they acquired a title which the plaintiffs were not at liberty to deny. We have no hesitation in saying that the ruling, as intended by the judge at the time, (as we gather that intention from the whole aspect of the case, and also from his recollection of the views by which he was governed,) was correct, and that the defendants could not defend by setting up a title acquired by purchase from the plaintiffs.

And yet, as the case is settled and laid before us on this appeal, the offer and the ruling are susceptible of the construction first above considered, and we ought not, perhaps, to say that the defendants' counsel may not have so understood it.

We hesitate the more in overruling the exceptions taken, because we find that in another particular the defendants have been plainly prejudiced.

The jury were charged that if the property in question did not pass under the purchase from Rider & Brothers, and if the defendants had used the articles until they had become valueless, they must answer for their value, or for the value of their use.

Taking the case most favorably for the plaintiffs, they had permitted the defendants to use the articles until a portion of them had been rendered of no value. In this there was, therefore, no ground for charging the defendants with the value of the articles as for a tortious conversion. And when at length the plaintiffs demanded the goods, the defendants permitted them to take all that were of any value. So that the defendants were not chargeable at all as *tort feasors*, and the plaintiffs were not liable for the value of the articles as such.

Under the proofs, all that the plaintiffs had a right to claim was the value of the use for six years next before the action was brought.

The jury were told, in another clause of the charge, that the statute of limitations applies to all the period anterior to six years before the beginning of the suit. And yet, under the direction which permitted the jury to give the plaintiffs the value of the articles, the statute of limitations could not be applied to the case, and accordingly the jury appear to have given to the plaintiffs the full value of the articles at the time they came into the possession of the defendants.

The articles came to the defendants' possession about eight years before this action was commenced. No evidence was given of the value of their use, unless such value could be inferred from the testimony showing the probable annual depreciation in value from the use, and the fact that during the period of use some of the articles had been worn out and become valueless. It may, perhaps, be a just presumption, that in the ordinary course of business, the use of an article voluntarily procured and used for the purposes of a manufacture, is worth at least its ordinary deterioration by such use. But such a presumption is by no means conclusive, and would not warrant a charge that, as matter of law, the plaintiffs were entitled to recover the value of the articles.

By whatever testimony the jury were to arrive at the fair value of the use, finding the value of the articles themselves, as and for the value of the use, precluded the application of the statute, which only allowed a recovery for the use for six years.

We allude to this branch of the case not for the purpose of recognizing the exception taken to the charge in this respect as a

sufficient exception — the exception was too general; it was in terms to the whole charge — but because it may be useful on another trial, which, in view of the other exception before noticed, we think should be had. (4 Seld., 37; 4 Kern., 315.)

Judgment reversed and new trial ordered, costs to abide the event.

RICHARD LIDDLE, Plaintiff and Respondent, *v.* THE MARKET FIRE INSURANCE COMPANY OF THE CITY OF NEW YORK, Defendants and Appellants.

Although a policy of insurance for one year upon goods in one part of a building provides that if any person insuring shall make any misrepresentation or concealment, or if the building be occupied in any way so as to render the risk more hazardous than at the time of insuring, the insurance shall be void; and also that the insurance may be renewed for a further term, the risk not being changed, if the premium be paid and indorsed; and then declares that "all insurances, original or renewed, shall be considered as made under the original representation in so far as it may not be varied by a new representation *in writing*, which in all cases it shall be incumbent on the insured to make, where the risk has been changed either within itself or by surrounding and adjacent buildings."

1. *Held*, nevertheless, in an action on the policy, (the same having been renewed after a portion of the building had been appropriated to a specially hazardous use,) that parol evidence was competent to show that at the time of the application for renewal the insured verbally communicated to the Secretary of the Insurance Company that such change in the risk had taken place. And also *held*, that the renewal after such verbal communication was a waiver of the provisions above recited. (WOODRUFF, J., dissented.)
2. Where after a communication had been opened between the store, which contained the insured goods, and an adjoining store, then hired by the insured for the purposes of his business, the following indorsement was made on the policy: "October 3d, 1855. The communication made with adjoining stores does not prejudice this insurance." *Held*, that such indorsement did not operate to extend the insurance so as to cover or protect any goods in such adjoining store; and also that parol evidence to show that the parties intended by such indorsement to extend the insurance to such goods was inadmissible.

(Before SLOSSON, WOODRUFF and PIERREPONT, J. J.).

Heard, October 7th, 1858; decided, February 19th, 1859.

THIS action came before the Court by appeal from the judgment rendered for the plaintiff on a verdict in his favor for $2,112. The action was tried on the 21st day of April, 1858, before Mr. Justice SLOSSON and a jury.

The complaint of the plaintiff prays judgment for $2,000 and interest, being the amount insured by the defendants by policy, dated December 28th, 1856, on the plaintiff's "stock, as a house and kitchen furnisher and dealer in stoves, manufacturer of tin and sheet iron ware; on his store fixtures, furniture and signs; on his tools appertaining to his business as manufacturer aforesaid; all contained in the premises occupied by him in the westerly end of the brick building known as City Central Hall, situate on the corner of Fulton avenue and Elm place, city of Brooklyn," averring a loss by fire during the period of insurance exceeding that sum, proofs of loss, &c., &c.

The answer averred that the insurance was made by a policy dated December 28th, 1854, which was renewed for one year December 28th, 1855, and again for one year December 28th, 1856, by certificates of renewal. It denied that the plaintiff had lost by the fire the alleged amount of goods in the premises covered by the policy, and averred that the goods being at the time of the fire in that particular store were of small amount; and it further averred that when the policy was executed the building described therein was not in any part of it occupied for extra hazardous or specially hazardous purposes, but before the last renewal the building was put to a specially hazardous purpose, and the risk greatly increased by the use thereof for a bakery, of which, at the time of the last renewal, the defendants were ignorant; and that the plaintiff, in violation of the conditions annexed to the policy, failed to give notice of such increase of the risk, and the alleged fire in fact originated in the said bakery. The other grounds of defense are not material to the case as considered on the appeal.

On the trial the plaintiff read the policy and certificates of renewal in evidence, bearing the dates alleged in the answer. It was part of the terms of the policy that "if the premises mentioned in the policy shall at any time after making, and during the time this policy would otherwise continue in force, be appropriated, applied, or used, to or for the purpose of carrying on or

exercising therein any trade, business or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy; or for the purpose of storing therein any of the articles, goods or merchandise in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates, except as herein specially provided for, or hereafter agreed to by this corporation, in writing, to be added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used these presents shall cease, and be of no force or effect." "And that this policy is made and accepted in reference to the proposals and conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein specially provided for."

"This insurance (the risk not being changed) may be continued for such further term as shall be agreed on, provided the premium therefor is paid, and indorsed on this policy, or a receipt given for the same."

Bakeries are mentioned in the policy as specially hazardous.

By the conditions annexed to the policy "applications for insurance must be in writing, and must specify the construction and materials of the building containing the property to be insured; by whom occupied; whether as a private dwelling or otherwise; whether any manufactory is carried on within it;" and "if any person, insuring any building or goods in this office, shall make any misrepresentation or concealment; or if, after the expiration of a policy of insurance, and before renewal thereof, the risk of the building shall be increased by any means whatsoever within the control of the assured; or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect."

And the twelfth condition was as follows, viz.:

"XII. Insurances, once made, may be continued for such further time as may be agreed on; the premium required therefor being paid and indorsed on the policy, or a receipt given for the same; and all insurances, original or renewed, shall be considered as made under the original representation, in so far as it may not

be varied by a new representation, in writing, which, in all cases, it shall be incumbent on the party insured to make, where the risk has been changed, either within itself, or by the surrounding or adjacent buildings. And if, at or before the time of renewing any policy of insurance on property where the risk has been increased by the erection of buildings, or by the use or occupation of the premises insured, or of the neighboring premises, the assured shall fail to give information thereof, said policy and renewal shall be void and of no effect."

In December, 1854, when the original insurance was effected, the plaintiff occupied but one store. The entire building was 120 feet long, and was a large hall divided into five stores, the plaintiff occupying the store at the corner. In October, 1855, the plaintiff took also the store next adjoining, and opened a communication between the two, and on application by him the defendants made a re-survey of the premises, which appeared to have been done in accordance with a memorandum on the policy in pencil marks, proved to be the handwriting of Mr. Birdsall, who was President of the defendants in 1855, in these words, "connection with apartments next adjoining on Fulton avenue; re-survey." After this re-survey, the following indorsement on the policy was made, "October 3d, 1855. The communication made with adjoining stores does not prejudice this insurance."

In the summer of 1856, one of the divisions of the building was taken for a steam bakery, and the oven and machinery connected therewith were introduced and the business was carried on, which was proved to bring the building and goods insured therein within the denomination of specially hazardous risks, only insured at higher rates of premium than the plaintiff paid, and the fire in question was in fact caused thereby.

The plaintiff in his testimony respecting the renewal of the policy stated that when he applied in December, 1856, for the last renewal, he informed the Secretary of the defendants that the bakery had been introduced into the building, and asked him "whether he had not better send over some of his folks to see the building," and that the Secretary said, "yes, we'll let our surveyor go over and see it, or re-survey it, or words to that effect." The Secretary of the defendants being examined unqualifiedly denied that any such statements were made to him

or that he ever had any conversation with the plaintiff on the subject of the bakery, or that he knew, when the policy was renewed, of the existence of a bakery in the premises, or of an oven or machinery of any kind, or that any resurvey was made in reference to the bakery, or to the said renewal.

The defendant moved for a nonsuit, on the ground that no statement in writing was made at the time of the last renewal, disclosing the increase of the risk.

The motion was denied, and the defendants excepted.

It appeared that about $5,000 worth of goods were destroyed by the fire. These goods were at the time in both of the stores occupied by the plaintiff, and there was other insurance on the goods to the amount of $2,000. On the question, what proportion of the goods lost were in the corner store at the time of the fire, the evidence was conflicting.

During the examination of the plaintiff as a witness in his own behalf, his counsel inquired as follows:

"Q. State what was said by you to the officers of the Company, at the time memorandum of communication was indorsed, as to your intention thereafter to occupy both the stores?

"(Defendants' counsel objects that the question asks for parol evidence to enlarge the construction of policy. Objection overruled and exception noted.)

"A. To the best of my knowledge, I stated I was going to separate my stock and keep a portion of it in the new store, and occupy both stores."

At the close of the testimony the defendant renewed his motion for a nonsuit, on the ground of the non-compliance by the plaintiff with the twelfth condition of the policy, claiming that the conflict in the oral testimony presented a case which made that condition controlling. The motion was denied, and the defendants excepted.

The Court thereupon charged the jury, that the privilege inserted in the policy, October 3d, 1855, of connecting with the adjoining store, did not of itself extend the insurance over that store, nor by the language and terms of the policy, and of the renewal certificates, is the insurance necessarily extended to the stock in such adjoining store, but that the insurance was so extended, if the jury should find that such was the intention of the

parties when the privilege was given, and the renewals made; and that in determining that intention, the jury might consider the verbal communication made by the plaintiff when he applied for the privilege of making the connection, the pencil indorsement on the policy, and the fact of the resurvey made by the defendants at the plaintiff's request.

That if the jury should find, that the policy was intended by the parties to cover the goods in both stores, they would find for the plaintiff the amount of the actual loss he had sustained, but if they found that the policy covered only the corner store, they would find for the plaintiff no greater sum than the value of the goods lost in that store; in no event in either case exceeding the sum insured, and the interest thereon.

The Court further charged the jury, that if they found that the risk to the premises had been increased by the erection in them of the steam bakery and machinery spoken of, they should find for the defendants, unless they found that at the time of obtaining the last renewal the plaintiff made a full and fair communication to the defendants of the facts so increasing the risk, so that the Company had full notice of that fact, and had a full opportunity of re-surveying the premises before renewing the policy; that if they should find this to have been so, then he charged them for the purposes of this trial, that the policy was not rendered void by the plaintiff not having literally complied with the twelfth condition in the policy, in not making his representation or communicating his information in respect to the bakery in writing.

The defendants' counsel duly and separately excepted to the portions of the charge, which allowed the jury, in determining the intention of the parties when the connection with the adjacent store was permitted, to take into consideration the verbal statements made at the time by the plaintiff. Also, to that portion in which the Court instructed the jury that if the plaintiff, on obtaining his last renewal, made a verbal statement of the facts which had increased the risk to the premises, the absence of a statement in writing did not render the policy void. And said exceptions were severally duly noted.

The jury having retired, returned into court with a verdict for the plaintiff of $2,112.

Stephen P. Nash, for the defendants, (appellants.)

I. The extent of the risk covered by the defendants was to be ascertained from the policy, which originally embraced only the single store occupied by plaintiff, "in the west end of the City Central Hall." Testimony was admissible to locate that store, but, clearly, evidence of verbal statements between the parties at the time the policy was written, would not be admissible to enlarge the meaning of its language. When plaintiff took an additional store, it was optional with the parties to include both stores in the insurance or not, as they might agree, but having put in writing what they did agree to, parol evidence to enlarge the terms of the writing was inadmissible. The writing was simply a permission to make a communication with the next store, an alteration in the premises, which, but for the permission, might have avoided the policy. To make of this, by parol evidence, an extension of the risk so as to embrace both stores, was clearly a variation of the contract. (*N. Y. Gas Light Co.* v. *Mech. F. Ins. Co.*, 2 Hall, 108; Angell on Fire Ins., 56, § 21.)

II. The twelfth condition of the policy made it incumbent on plaintiff, when he procured the last renewal, to make a representation in writing as to the increased risk caused by the steam bakery. He succeeded, however, in practically annulling this condition, by his own oath, unsupported by other evidence, that he had given verbal notice to the defendants' secretary of the facts which the contract required to be stated in writing.

1. The original contract of insurance had expired. When the plaintiff came to renew it he was required by the conditions in reference to which the policy was originally "made and accepted," to make a representation in writing if the risk were changed; the body of the policy providing for the case of a renewal, "the risk not being changed." The case stands, therefore, in the same position as if the Company were then applied to for the first time for an insurance, and the conditions required the application to be in writing, and to contain certain statements material to the risk. In such a case, where the application omits material facts, verbal notice of such facts to the agent effecting the insurance, does not cure the omission. (*Jennings* v. *The Chen. Co. Mut. Ins. Co.*, 2 Denio, 75; approved in *Gates* v. *Mad. Co. Mut. Ins. Co.*, 2 Comst., 43; and *Wilson* v. *Herk. Co. Mut. Ins. Co.*, 2 Seld., 53;

Westfall v. *The Hudson River Fire Ins. Co.*, 2 Duer, 490; *S. C.*, Ct. of Appeals, MS.)

2. The theory of the Court upon the trial seems to have been that, assuming verbal notice of the increased risk to have been given to the Secretary, if he did not require a statement in writing he waived the condition.

Without disputing that a party to a written agreement may, in many cases, dispense by parol with conditions in his favor, which he might by the terms of the agreement insist upon, it is submitted that such dispensations, to amount to a waiver, should be express, the ground upon which the Courts sustain them being that a party shall not be heard to insist upon a performance which he has prevented. In this case, the alleged waiver is a mere inference from the agent's silence, under a notice which he denies receiving, and so the very object of the condition, the securing, that is, of written evidence of the transaction is destroyed. It is not pretended that there was anything said in reference to a waiver, but the argument is that the benefits of the twelfth condition, which was already a part of the agreement, were lost, unless its requirements were verbally imposed anew.

3. But the defendants' Secretary had no right to waive the requirements of the twelfth condition. His authority was to issue and renew policies in accordance with the terms and conditions expressed in them. The form of the policy, its clauses, provisoes and conditions, expressed the terms upon which the corporation were willing to insure; its subordinate agents had no right to dispense with these.

III. The evidence in reference to the alleged notice of the increased risk, was the testimony of the plaintiff only. Had the claim been almost any other than one against an insurance company, it would hardly have received credit from a jury, unsupported as it was by all other proof. It is not credible that an insurance company, with full notice of facts entitling it to a higher rate of premium, should not have claimed it. But if all the conditions companies may impose as safeguards against fraud and false swearing may be broken down by the kind of evidence that the contract they enter into excludes, they have little security against the grossest impositions, no matter how weak the evidence against them.

I. T. Williams, for the plaintiff (respondent).

I. The renewal of the policy on the 28th day of December, 1856, was equivalent to the issuing of a new policy, as of that date, in the identical words of the old policy, save the dates.

1. If we read the policy as bearing date the 28th day of December, 1856, it is broad enough to cover all the property in both stores.

2. It is, then, immaterial whether the ruling of the Court upon the question, was correct or not.

3. The testimony was competent to show, that prior to the last renewal, the defendant knew that the plaintiff was occupying both stores, and that his stock was partly in one and partly in the other.

4. The ruling upon this point is immaterial, as it appears that the value of the property destroyed in the corner store amounted to more than the sum recovered.

II. The Company clearly had the power to waive, and in fact did waive, their own rule, and issued the policy—*i. e.*, the renewal—upon the verbal representations of the plaintiff, and received his money, thereby waiving any latent rule to the contrary, which it may have prescribed for its own convenience. (See *Mechanics' & Farmers' Bank* v. *Smith*, 19 Johns., 115; *Green* v. *Bateman*, 2 M. & W., 359; *Tuttle* v. *Love*, 7 Johns., 470; *Hutchinson* v. *Brother*, 5 M. & W., 535; *Pitt* v. *Smith*, 3 Camp., 33.)

By the Court—Slosson, J. Had it clearly appeared by uncontradicted evidence that the verdict was not larger than the defendants' proportion of the loss on the goods, fixtures, &c., actually destroyed by the fire in the corner store, I should not be disposed to disturb it. The whole question would then have turned on the correctness of the second proposition of the judge's charge; and in respect to that, a majority of the Court hold that it is perfectly competent for a party to an instrument to waive a strict compliance with a condition of the contract in his favor, which we hold this condition to be, and that, assuming Liddle's testimony to have been true, and that a verbal communication of the erection of the bakery was in fact made by him to the

Secretary, on his application to the Company for the last renewal, and assuming that the notice thus given to that officer was notice to the Company itself, in respect to which no point was made at the trial, but it was rather conceded—the Company, by renewing the policy after such notice, waived a strict compliance with the twelfth condition of the policy, which required such information to have been made in writing, and that in any event the Company, under such circumstances, are estopped from setting up the increased risk in bar of the action. (*Ames* v. *The N. Y. Mer. Ins. Co.*, 4 Kern. R., 253; *Smith* v. *Gugerty*, 4 Barb. S. C. R., 614; *McEwen* v. *The Montgomery Co. Mut. Ins. Co.*, 5 Hill R., 101; *Wilson* v. *The Genesee Mut. Ins. Co.*, 4 Kern. R., 418.)

The proof, however, if not conclusive the other way, leaves it at least in doubt whether the defendants' *pro rata* proportion of the loss on the goods actually destroyed in the corner store, including the cellar and loft, was not considerably less than the verdict. In other words, whether there was an amount of goods destroyed in the corner store, which, on a *pro rata* division of the loss between the defendants and the New World Insurance Company, would make the defendants' proportion equal to the amount of the verdict.

It becomes necessary, therefore, to consider whether there was error in the first portion of the charge, which was as follows: "That the privilege inserted in the policy, October the 3d, 1855, of connecting with the adjoining store, did not, of itself, extend the insurance over that store, nor, by the language and terms of the policy and of the renewal certificates, is the insurance necessarily extended to the stock in such adjoining store, but that the insurance was so extended, if the jury should find that such was the intention of the parties when the privilege was given and the renewals made, and that in determining that intention, the jury might consider the verbal communication made by the plaintiff, when he applied for the privilege of making the connection, the pencil indorsement on the policy, and the fact of the resurvey made by the defendants at the plaintiff's request."

The privilege of communication between the two stores, was inserted in the policy October the 3d, 1855, in these words: "The communication made with adjoining stores, does not pre-

judice this insurance." The verbal communication made by the plaintiff at the time he applied for this privilege, was, that he was going to separate his stock, and keep a portion of it in the new store, and occupy both stores, and the pencil indorsement on the policy, made by the Company's then President, was, "Connection with apartments next adjoining Fulton avenue—re-survey.

If, as the judge charged, and correctly, the privilege, as inserted in the policy, did not of itself extend the insurance over the goods in the adjoining store, and there was nothing in the language of the policy itself which necessarily embraced the stock in such adjoining store, then the admission of evidence of what was said at the time the plaintiff applied for the privilege, was the admission of parol evidence to enlarge the terms, scope and force of the written contract, and, in effect, to incorporate a new provision into it.

It is urged that the language of the policy was broad enough to embrace both stores, as both stores in fact constituted the "corner of" the two streets named in the policy. The answer is, that when the policy was first executed, there was a corner store distinct from that which was subsequently connected with it, and its language must always be read in the sense in which it was then used. To admit the evidence objected to, would be to enlarge the meaning of these words, and to give to them another and different signification than that in which they were understood when employed by the parties. (*Jennings* v. *The Chenango Co. Mutual Ins. Co.*, 2 Denio R., 75; *Lamotte* v. *The Hudson River Fire Ins. Co.*, 17 N. Y. Rep., 199.)

There must be a new trial, costs to abide the event.

PIERREPONT, J., concurred.

WOODRUFF, J. I am not able to concur in the conclusion, that the policy in this case was valid if the jury found that at the time of obtaining the last renewal the plaintiff made a full and fair communication to the defendant of the facts increasing the risk, notwithstanding the communication was not in writing.

The twelfth condition annexed to the policy of insurance was a reasonable condition, and one to which both parties to the

insurance must be deemed to have agreed, as a part of the express contract.

It was designed to protect the defendants against liability upon renewals after a change in the risk, unless they had clear information of such change, and the particulars thereof, in such a form as amounted to a warranty of the then actual condition of the insured premises.

It was a voluntary agreement of the parties also in relation to the nature of the evidence which alone should be competent to show that the application of the plaintiff for insurance was altered when he sought a renewal.

The defendants had insured the plaintiff, upon his written application representing the condition of the premises, and it was a wise and reasonable precaution, to stipulate that any renewal of that policy should be considered as made upon the same representation, unless varied by a new representation *in writing;* and this being assented to, the plaintiff knew when he accepted the renewal, that according to the express terms of the contract, such renewal was to be deemed and construed as an insurance made upon his written representations made when the policy was first issued.

Unless this be so, the requirement that such new representation should, in order to vary the rights of the parties be in writing, was wholly useless and nugatory. No case can be stated in which, if an oral communication is equally effective, this stipulation could have any operation, and for the obvious reason that the assured may wholly disregard it, and nevertheless recover.

It was surely competent for the parties to agree by what means alone the representation first made should be altered. Had the condition read in terms, that no merely verbal communication made to the Secretary of the Company shall have that effect, it could not, I think, be claimed that the Company had not a perfect right so to define and limit the power of their officer to act, and yet the doctrine contended for binds the corporation in the face of their express refusal to be bound.

These conditions are not technical merely. The Company may very properly be taken to have had in view, just what has happened in this case, viz.: a conflict of evidence upon the very question, whether when this renewal was made, the assured rep-

resented to them that the risk had been changed by the introduction of the bakery, oven, &c.

Their Secretary testified positively that no such representation was made to him, and that he did not know of the existence of the bakery, nor of an oven, nor of machinery, on the premises.

Not only so, both parties were interested to guard against the uncertainty of human life and memory, and the danger of relying upon means of proof seldom very accurate, often and easily rendered unavailable. The assured himself had protection in this condition as well as the Company.

The mutuality of benefit to the parties in confining them both to the terms of the stipulation will be apparent, if we suppose that the defendants were here claiming that at the time of the renewal, the assured made to their Secretary an oral representation amounting to a warranty in some particular not mentioned in his original written representation, and also claiming that such warranty was broken; the plaintiff would himself then appreciate the benefit of a stipulation forbidding any such proof, that his original representation had been altered or changed.

There is nothing in this case to warrant a charge of fraud on the part of the defendants; it stands upon the single question: When the parties have expressly agreed that any renewal of the policy shall be deemed made in reliance upon the original written representations unless a new representation is made by the assured in writing, will an oral representation have the effect to create the exception?

It is not denied that if the renewal is to be deemed made upon the original representations, the policy is void. I think the agreement of the parties is binding upon both of them, and that the Court is bound to give it effect.

The case of *Ames* v. *The New York Mutual Insurance Company*, (4 Kern. R., 253,) does not appear to me to conflict with this view of the subject. There no representation whatever in writing was made by the assured. What the defendants relied upon as a representation was a mere memorandum made by their own agent. The agent was fully apprised of all the facts. There was nothing in the conditions of the insurance that directly or impliedly imported that no policy issued by the officers of the

Company should be valid or binding, unless based upon a written application by the assured.

If the Company chose to insure without any application whatever, containing the particulars, which, if an application was made, must be inserted therein, they might well be held bound. But, if in fact, an application was made, a stipulation that such application should be deemed a continuing representation, unaffected by merely verbal statements to one of the officers of the Company, may yet be binding upon both parties.

In the case cited no application was made by the assured. The agent of the Company had actual knowledge of the incumbrances on the property. The policy itself contained express mention of the other insurances on the same property.

It is impossible to say in that case, that the assured had violated any condition upon which the insurance was made. Some of the language of the opinion may seem to sustain the plaintiff's claim in this action, but the case itself is not inconsistent with the views above expressed.

I think, therefore, that for this reason, as well as for the reason that testimony was received to oral representations made at the time of renewing the policy, to alter and enlarge the operation of the permission then given to open a communication with the adjoining store, the judgment should be reversed and a new trial ordered, costs to abide the event.

Judgment reversed and a new trial ordered.

ALEXANDER McKENSIE, Plaintiff, v. JOHN FARRELL and JOHN HIGGINS, Defendants.

1. In an action upon an alleged joint contract against two defendants, or of whom alone appears and answers, proof that he signed the contract in his own name and as attorney for the other defendant, is sufficient to entitle the plaintiff to read the contract in evidence, without proving any authority from the co-defendant to the other to sign for him.
2. Establishing a joint liability by evidence, competent as to the defendant who does appear and answer, entitles the plaintiff to judgment.

3. So, *it seems*, although the defendant who does not appear has not been served with process.
4. Under the New York Code of Procedure, the plaintiff in an action on an alleged joint contract against two defendants, may have judgment against the one, against whom he establishes a cause of action, although he does not show that the other defendant is jointly liable.
5. The surrender of a term does not operate to discharge the tenant or his sureties from rent already accrued and become payable.
6. A reletting of the demised premises by the direction of the surety for the payment of the rent, for the account and benefit of the surety, after the tenant has failed and abandoned the premises, does not operate as a surrender so as to discharge the surety from further liability.
7. The entry by the landlord upon the premises, and taking and detaining fixtures and furniture, alleged by the surety for the rent, to belong to himself, are no defense to an action against the surety for the rent; and such facts are not available as a counterclaim in such an action.
8. Where a tortious taking and conversion of personal property are set up as a counterclaim, the omission to reply thereto does not admit that the defendant is entitled to the damages he alleges. A counterclaim is in the nature of a complaint in a cross action; and in trespass or trover for taking or converting personal property, it is not necessary for the defendant to deny the averment of value or the allegation of damage. They must be proved, even on an assessment.
9. Where a verdict is taken, subject to the opinion of the Court at General Term, the Court ought not to entertain objections which, if suggested at the trial, might readily have been obviated.
10. Where the undertaking of a surety for rent is absolute, that if default be made by the tenant at any time, the sureties will pay the rent and all damages, &c., without requiring notice from the landlord of the tenant's default, it is not necessary for such landlord, in an action against the surety, after the tenant has abandoned the premises, to prove a previous demand upon the tenant.
11. An instrument under seal, written beneath a lease to A., whereby, "in consideration of the demise of the premises above mentioned," the signers covenant for the payment of the rent reserved in the lease, is a valid agreement under the statute of frauds, and sufficiently expresses the consideration.
12. Although the complaint, upon such an instrument, avers that the lease was given, and that "the said indenture of lease having been so made and sealed, the defendants afterwards, on the same day and year, by a certain agreement under their hands and seals, in consideration of the demise aforesaid, did covenant and agree," &c., if on the trial it appear that the execution and delivery of the lease and of the instrument of suretyship, were simultaneous acts, and the giving of the sureties was the inducement to the landlord to the giving of the lease, the Court will not yield to the objection that the complaint shows on its face that the covenant of the

surety was without consideration or upon a past consideration. If necessary, the Court would order the complaint to be amended.

(Before Bosworth, Ch. J., and Woodruff, J.)

Heard, November 9th, 1858; decided, February 19th, 1859.

This action was brought against the defendants as sureties or guarantors for the payment of rent, and the performance of covenants by Edward H. Newman.

The complaint, so far as is material to the questions raised herein, avers the making and delivery of a lease, dated September 21st, 1853, by the plaintiff, of certain premises on Broadway, in the city of New York, to the said Newman, for the term of ten years from the 1st day of May, 1853, at the yearly rent of $2,850, payable quarterly and also the annual water rate or tax on the premises. That the said indenture of lease having been so made and concluded as aforesaid, by and between the said plaintiff and the said Newman, the defendants afterwards, by a certain agreement under seal, dated September 21st, 1853, "in consideration of the demise of the premises above mentioned to the said Newman" covenanted, &c., that if default should be made by Newman they would pay the said rent, &c., and all damages that might arise in consequence of his non-performance of his covenants, "without requiring notice of such default."

The complaint then avers the entry by Newman, his default in the payment of the rent due November 1st, 1854, $712.50, but admits the payment of $557.75 on account thereof; a further default on the 1st day of February, 1855, in the sum of $712.50; another on the 1st of May, 1855, in the sum of $712.50; another on the 1st of August, 1855, in the sum of $712.50, on account of which, however, the plaintiff has received $587.50; and another default on the 1st of November, 1855, in the sum of $712.50, on account of which, however, the plaintiff has received $587.50. Demand of payment from the defendants of the rent and balances so in arrear is averred and judgment demanded therefor with interest.

The defendant Farrell, alone answered. He admits that a lease was made and concluded between the plaintiff and Newman, but denies any knowledge, &c., of its covenants and conditions. He denies the execution by the defendants of the agreement alleged to have been executed by them, and denies

the averments that rent payable by Newman is in arrear and unpaid.

And for a separate defense he avers that before the 1st day of February, 1855, the plaintiff entered upon the premises, took possession thereof, and on or about that day let the same to a tenant who has since been in possession thereof, and that this was done without notice to the defendant, and without his consent.

And he further says, that when the plaintiff took possession of the premises there were certain fixtures and furniture thereon, the property of the defendant, and that on or about the — day of ——, 1855, the defendant went to the premises and demanded that the said premises, with the said fixtures and furniture should be delivered to him, and offered to pay the arrears of rent then alleged to be due, provided said premises and fixtures would be so delivered, but the plaintiff refused to deliver the premises and fixtures, and illegally and unjustly detained said fixtures and furniture, and has never delivered them to the defendant. That such fixtures and furniture were worth $2,400, which the defendant claims as a "set off or counterclaim."

The plaintiff replied by a denial "that the said defendant is entitled to the sum of $2,400, or to any other sum, for damages as alleged and set forth by way of counterclaim in the said answer."

The action was tried before OAKLEY, Ch. J., and a jury, on the 20th April, 1857.

On the trial the plaintiff produced the lease alleged in his complaint, dated September 21st, 1853, and an agreement underwritten and bearing the same date, and attested by the same subscribing witness. The agreement is to the effect stated in the complaint as above also set forth, but the signatures are as follows, John Farrell, [L. S.] Jno. Higgins, per Jno. Farrell. [L. S.]

These signatures were admitted to be the defendant's handwriting, but the defendant objected to the reading of the agreement of guaranty in evidence, on the ground that no proof had been given that the defendant had authority from John Higgins to execute the instrument. The objection was overruled and the defendant excepted, and the papers were read in evidence.

The plaintiff then proved that Newman failed in business about November, 1854, and that after such failure the store described in the lease was closed. That after Newman's failure the plaintiff's agent, in November or December, 1854, called on the defendant for the rent in arrear, $462.50, and in November, 1855, he called on the defendant again for the rent then due which was $1,829.75, (the amount alleged in the complaint,) but the defendant paid no part of it.

On cross-examination the plaintiff's witness testified, that when he went to the defendant to ask for the rent he asked the defendant if he would allow him (the witness) to rent the premises for him, and defendant said he had no objection at all; "he authorized me to put a bill on the house; he told me to do the best I could, and he would be satisfied." Again, "I know that Mr. Farrell authorized me to rent the premises, and upon that authority I did rent them." "The rent was the best that could be got." The witness put a bill on the store, and having agreed with one Weston to hire the premises, a lease was prepared, the plaintiff notified of the defendant's having authorized the witness to let the premises; it was executed by the plaintiff to Weston in his own name; by this lease the premises were let to Weston for the term of eight years from the 1st of May, 1855, (being for the residue of the entire term of the previous lease,) at the yearly rent of $2,300, payable quarterly. Thereafter the rent due by Weston, $575 each quarter, was paid to the plaintiff.

In what manner the credits of $587.50 were made up was not proved in detail, but the plaintiff's witness proved that the balance of rent due under the terms of the lease to Newman was $1,829.75 on the 1st November, 1855, which was about the time this action was commenced.

No further evidence was given by either party. The defendant moved to dismiss the complaint on the ground,

1st. That a joint guaranty had not been proved.

2d. That the lease to Newman had been surrendered to the plaintiff, and the surrender accepted by him.

The motion was denied, and the defendant excepted.

The defendant then moved for judgment for the amount set up in his answer, as a counterclaim, over and above the amount claimed by the plaintiff, on the ground that the plaintiff's reply did not

deny, but admitted, said counterclaim and the damages claimed thereby.

This motion was also denied, and the defendant excepted.

A verdict was then taken for the plaintiff for $2,011.75, (the amount claimed, with interest,) subject to the opinion of the Court at General Term, with leave to the defendant, Farrell, to move to dismiss the complaint.

Upon a case presenting the pleadings and proofs, the plaintiff now moves for judgment on the verdict, and the defendant asks that the complaint be dismissed.

E. M. Willett, for the plaintiff.

I. In an action against two on a contract of guaranty, where it appears on the trial that the guaranty was signed by one only, the Court will conform the pleadings to the proof, and give judgment against the one who signed the guaranty. (§ 274 of the Code; § 136, 3d sub.; §§ 169 and 170 of the Code; *Brumskill* v. *James*, 1 Kern., 294; *Bonesteel* v. *Vanderbilt*, 21 Barb., 26.)

II. The evidence shows that there was no surrender of the lease, and a surrender, to be valid, must be in writing. (2 R. S., 194, title 1, ch. 7, § 6.)

III. The reply to the new matter set up in the answer, was unnecessary.

1. The matter set up does not constitute a counterclaim. (*Vassear* v. *Livingston*, 3 Kern., 248; *Nichols* v. *Boerum*, 6 Abb., 290; § 150 of the Code.)

2. It does not contain the necessary facts. (Cases last cited, and in addition, *Bates* v. *Conkling*, 10 Wend., 389.) Demand and refusal necessary where no unlawful taking.

3. It is a *tort*. (*Andrews* v. *Bond*, 16 Barb., 633; as to distinction between *tort* and contract; § 150 of the Code, 2d sub.; Anon., 1 Code R., 40.)

IV. If the new matter constituted a counterclaim, the reply was a sufficient denial thereof. (§ 153 of Code.)

V. If reply not a sufficient denial, the Court will give leave to amend the reply, especially as the presiding judge ruled in favor of the reply. (§§ 169, 170, 171, 173 of Code; amendments

on trial and before judgment; *Nichols* v. *Boerum*, 6 Abb., 290; trial suspended to allow motion to reply.)

R. O'Gorman, for the defendant, Farrell.

1. The complaint is founded on a joint contract, and no joint contract is proved. The deed, if valid at all, would be the deed of Farrell alone, and judgment cannot be had against him alone under the pleadings as they now stand. But the deed is not the deed of Farrell alone, and is entirely inoperative.

2. There is no evidence at all to support the most important point at issue, viz., that Newman, the lessee, ever failed to pay his rent, or made any default. No demand on Newman is proved; no refusal by him to pay; no evidence that he did not fully comply with all the covenants of his lease. (*Nelson* v. *Bostwick*, 5 Hill, 37.)

3. The defendants, if liable at all, are liable only for the rent due on November 1, 1854, viz., $462.50.

The testimony shows that at that time plaintiff's agent went to Farrell, one of the defendants, and asked him to rent the premises for him, and the premises were, in fact, let to one Weston afterwards.

Now, defendants are only liable as sureties for Newman, the lessee, and only during such time as Newman was liable—no longer.

But Farrell had no authority from Newman, the lessee, to consent to anything concerning the premises; and when plaintiff proposed to rent the premises with or without Farrell's consent, it amounts to an eviction of Newman.

4. Defendants' liability, if existing before May, 1855, clearly ceased then.

The plaintiff, then, clearly took undisputed possession of the premises, and let them to one Weston, who paid him rent.

It is idle to claim that this Weston went in as tenant of Farrell. He was not selected by him—got no lease from him—paid no rent to him.

5. Defendant's counterclaim is good, and he should have judgment for the difference, at least, between the amount of the verdict and the sum he claims. The reply denies nothing. (Code, §§ 150, 153, 168; *Lemon* v. *Trull*, 13 How. Pr. R., 248.)

6. There is no sufficient consideration for the guaranty. The seal is only *prima facie* evidence of consideration. (2 R. S., 653, § 107.)

The only consideration which can be set up, is that expressed in the deed. Where the consideration is not expressed in the deed, it may be shown *aliunde;* but where expressed in the deed, none other can be shown. (*Schermerhorn* v. *Vanderheyden*, 1 Johns., 139; *Winchell* v. *Latham*, 6 Cow., 690; *Maigley* v. *Hauer*, 7 Johns., 342; *Emery* v. *Chase*, 5 Greenl., 232.)

Where words "for other considerations" are used, it is otherwise.

The consideration expressed in the deed is bad.

It is admitted in the complaint that the guaranty was executed after the demise.

A mere promise to pay an antecedent debt of the principal, is without a sufficient consideration. (Chit. on Con., 436, and notes.)

There must be some present consideration—some advantage to the guarantor or his principal on account of the guaranty.

It is not stated that the demise was at the request of the defendant.

By the Court—Woodruff, J. An exception was taken on the trial to the ruling of the Chief Justice admitting the agreement in evidence upon which the action is founded. Although that exception is referred to in the points of the defendant's counsel as a part of the history of the cause, it was not claimed by him that the ruling was erroneous, and no such suggestion appears upon the points submitted.

Unless it is true that in this action the plaintiff can have no judgment against the defendant Farrell, who alone appeared and answered, without establishing a right as against Higgins, (the co-defendant,) to a joint judgment against both, then the objection was utterly groundless. As between the plaintiff and Farrell, sufficient proof was given to bind Farrell; indeed, it was admitted that he himself signed the agreement, and that he also signed Higgins' name, in form, as his agent or attorney. That admission concluded Farrell. He could not deny his own authority, and as to him, it is to be assumed that he had authority to sign and seal the agreement for Higgins.

But such a signing, and Farrell's admission on the trial, did not bind Higgins without other proof. If, therefore, the plaintiff was bound to prove on the trial, by evidence competent as against Higgins, that the lease was executed by his authority, or in default thereof fail to recover as against Farrell, then although as against Farrell, the agreement was competent evidence—the plaintiff could not recover.

This inquiry involves the next exception taken on the trial, viz.: to the refusal of the Chief Justice to dismiss the complaint because a joint guaranty had not been proved.

The case, as made up and submitted to us on the argument, does not show whether the summons and complaint have been served on the defendant Higgins. If they were, and he neglected to appear and answer, then he admitted that the agreement was executed by himself; as to him, the verdict was a mere assessment; and, therefore, when by proof, competent as against Farrell, the execution of the agreement by both was established, the plaintiff was entitled to claim against both as joint guarantors or sureties, and the objection is groundless. (See *Halliday* v. *McDougall*, 22 Wend., 264; *Downing* v. *Mann*, 3 E. D. Smith, 36.)

And if, in truth, the defendant Higgins was never served with process, then the case of *Halliday* v. *McDougall* shows that if the plaintiff gave proof sufficient to charge Farrell as a joint contractor with Higgins, it was enough to entitle him to a joint judgment.

And it has already been said that Farrell, having assumed to sign for his co-defendant, he was not at liberty to deny his own authority. That was proof enough, as to him, of his joint liability.

But it is now settled that under the Code it is not necessary that a plaintiff who declares against two upon an alleged joint contract should establish a joint liability or fail in his action. That the rule was otherwise before the Code is unquestionable, and numerous decisions were made since the Code was enacted, that in this respect the Code had not altered the common law rule. But the Court of Appeals, in *Brumskill* v. *James*, (1 Kern., 294,) held that the common law rule is altered, and that now, under sections 274 and 136, judgment may be had against the defendant, who is shown to be liable although proof is not given that is sufficient to charge his co-defendant, if the case proved

is one in which the defendant would have been liable if sued alone. (*Claflin et al.* v. *Butterly & Devin*, 5 Duer, 327.)

The other ground upon which a dismissal of the complaint was urged was that the lease to the tenant had been surrendered and the surrender accepted.

To dispose of this, so far as it is alleged to constitute a reason for dismissing the complaint, it must suffice to say that what is called a surrender, viz.: the reletting of the premises, was not made until the 1st of May, 1855. Only $250 of the plaintiff's claim accrued after that time. A surrender, where one takes place, does not operate to release the tenant from rent already accrued. And if such a change in the relation of the parties could have any other operation upon the obligation of the sureties for the rent, (*e. g.*, as an alteration of the principal contract without the consent of the sureties,) there is no foundation here for such a claim, because in this case it is proved without contradiction that the reletting relied upon as a surrender was by the authority and consent of the defendant.

Whatever, therefore, may be the effect of this reletting upon the right of the plaintiff to claim rent from Newman or his sureties, from and after the 1st of May, 1855, it furnished no reason for dismissing the complaint. The rent accrued to that day, and in arrear, was not thereby released, nor was the plaintiff's right to recover therefor affected. (*Sperry* v. *Miller*, 16 N. Y. R., 407.)

The remaining exception was to the refusal of the Chief Justice to order judgment for the defendant for the amount of the damages set up by him as a counterclaim, so far as such amount exceeded the claim of the plaintiff.

No proof whatever was given of the facts alleged in this part of the defendant's answer, and therefore if they constituted any "defense" to the action, they were in issue by law and not being proved they cannot avail the defendant. Matters of mere defense call for no reply. (Code, § 168.)

But if the facts stated would, if true, constitute a legal counterclaim, then, unless put in issue by a reply, they are to be deemed admitted.

We are of opinion that the reply in this case was not sufficient to put those facts in issue. No one fact alleged as a ground of counterclaim is denied by the reply; all that the reply contains

is a denial that the plaintiff is entitled to the sum he claims for damages, or to any other sum. It seems rather to admit the facts to be true, and to insist that the plaintiff is nevertheless not entitled to damages.

But the motion was properly denied upon either of two grounds:

1. If the facts alleged, to wit: the taking possession of and the detention of the defendant's fixtures and furniture, would constitute a proper counterclaim in this action, the omission to reply did not admit the value of the property nor the amount of damages. A counterclaim is in the nature of a complaint in a cross action, and in an action for taking or converting personal property, it is not necessary for a defendant to deny the amount of value or the allegation of damage. They must be proved on an assessment although the defendant puts in no answer. (*Connoss* v. *Meir*, 2 E. D. Smith, 314; *Butterworth* v. *Kennedy*, Sup. Ct., G. T., Nov. 27th, 1858.) So here the defendant, if his facts warranted a counterclaim, should have proved his damages, and not having done so he could claim to be allowed nominal damages only.

2. The facts alleged do not constitute a counterclaim. They neither arise out of the contract which is set forth in the complaint as the foundation of the plaintiff's claim, viz.: the agreement of suretyship, nor out of any other contract, nor are they connected with the subject of the action, viz.: the rent of the store.

They show a mere tort, a trespass to personal property, and an unlawful detention thereof. This is no counterclaim in an action on contract for the rent of a store. (*Drake* v. *Cockroft*, 4 E. D. Smith, 34; 10 How. Pr. R., 377.)

This disposes of all the questions which were raised at the trial.

Upon the argument before us at the General Term the defendant's counsel presented for our consideration several points, then for the first time suggested.

If on the hearing of a cause in which the verdict is taken at a litigated trial, subject to the opinion of the Court upon the questions of law, the General Term should permit any questions of law to be raised which were not raised on the trial, it should not be such as if suggested there, might readily have been obviated.

The defendant here, now objects that the proof does not sufficiently show that the tenant did not pay the rent, nor that it was demanded of him.

Had any such suggestion been made the plaintiff would have had an opportunity to give further proof on those points if he thought proper.

And if we deemed the proof in these particulars defective, we should be reluctant to order a new trial when, as in this case, it is manifest, from the history of the trial given in the papers, that no importance was attached to this question, and that both parties conducted the trial, not indeed upon any formal admission that these facts were sufficiently proved, but upon a plain recognition that they were true.

We think, moreover, that enough was proved. The plaintiff's witness testified in terms to the amount of rent in arrear, and the lease showed when it accrued. If the defendant will take the benefit of the payments admitted in the complaint to have been made, then computation fixes precisely when the default took place, and just how much of each quarter's rent was in arrear. If the defendant desired any more specific evidence, he had an opportunity to cross-examine the witness. As the case stands his statement in general terms of the amount in arrear is *prima facie* sufficient.

In relation to a demand of the tenant, the proof is of a demand in November, 1854. That the tenant then failed and the store was closed, and thereafter demand was made of the surety, and no objection is suggested down to this argument that a demand from the tenant was desired, or would avail anything. If a demand were material, it would be no injustice to hold the objection waived. Had the objection been made, even on the trial, the plaintiff would have had an opportunity to show either a demand, or that due diligence was used, or show other circumstances excusing a demand.

We, however, do not think that, where the tenant had failed and abandoned the premises, it was the duty of the plaintiff, under this agreement, to pursue him for the purpose of making a demand from quarter to quarter. The undertaking of the defendant was absolute and unqualified to pay the rent if the tenant did not, and that without requiring notice of the tenant's de-

fault. He undertook to see to it that the rent was paid. This is unlike an undertaking that another shall pay on demand. (5 Hill, 37.)

Although the reletting by the plaintiff to Weston did not discharge the defendant from liability for rent already accrued and in arrear, and therefore was no ground of nonsuit, it is now insisted that it has effect as a surrender, by operation of law, and therefore the defendant was discharged from any liability for rent accrued after the first day of May.

That an entry upon the demised premises, and the giving of a new lease by the landlord to a third person, with the consent of the original lessee, the occupation by the new tenant, and the acceptance of rent from him by the landlord, would terminate the right of the landlord to claim rent of the original lessee, cannot be denied. (*Schieffelin* v. *Carpenter*, 15 Wend., 400; *Hegeman* v. *McArthur*, 1 E. D. Smith, 147; *Stone* v. *Whiting*, 2 Stark. R., 235; *Sparrow* v. *Hawkes*, 2 Esp. N. P. R., 505; *Thomas* v. *Cook*, 2 Barn. & Ald., 119.)

So it was held in *Walls* v. *Atcheson* (3 Bing., 462,) that where a tenant quit the possession in the middle of a term, and the landlord let them to another tenant, he could not recover against the original tenant. In that case, however, the lease is not stated to have been in writing, and the Court treat the acts of the landlord as a rescission of the agreement for the letting and hire of the premises.

Again, the lease provided that if the rent was not paid, the landlord might re-enter. The lease was forfeited if the landlord chose to avail himself of his right of re-entry. But even then the tenant would remain liable on the covenants for all rent which accrued and became payable before such re-entry. (*Hall* v. *Gould*, 3 Kern., 134, and cases cited.)

Probably there was not enough shown, however, to entitle the landlord to re-enter as for a forfeiture. (See 2 Comst., 141; 16 How. Pr. R., 449.)

And if the act of the landlord in taking possession of the premises and letting them to Weston, was not with the assent of the tenant, and did not amount to a surrender, and was not a re-entry to enforce a forfeiture of the term, then it was an eviction of Newman, and an eviction suspends the rent until the pos-

session is restored to the tenant. But an eviction does not prevent a recovery of rent accrued and payable before the eviction takes place. (*Giles* v. *Comstock*, 4 Comst., 270; *Vernam* v. *Smith*, 15 N. Y. R., 327.)

Surrender, entry and eviction would either of them terminate the right of the landlord to collect rent accruing and payable thereafter.

But as between the defendant, Farrell, and the plaintiff, there was neither eviction, entry nor surrender, which affected Farrell's liability.

There was no eviction. As to him, nothing illegal or tortious was done. On the contrary, the reletting was by his express request and authority and for his benefit. Unless, then, the reletting operated *per se* as a surrender, a voluntary acceptance of the new tenant as a substitute for the former lessee, the reletting only affected the defendant, Farrell, to the extent which the rent paid by the new tenant reduced the amount for which he was liable to the plaintiff.

McFarlane asked the defendant if he would allow him (McFarlane) to rent the premises for him. He authorized McFarlane to put a bill on the house. He told McFarlane to do the best he could, and he would be satisfied. McFarlane put a bill on the store as authorized by the defendant, and received a number of applications. The plaintiff being informed of the authority given to McFarlane, introduced Weston to McFarlane as the defendant's agent. McFarlane and Weston agreed upon the rent, which rent was the best that could be got. In the further language of the witness, McFarlane, "The defendant, Farrell, authorized McFarlane to rent the premises, and upon that authority he did rent them to Weston."

Here is clear proof of an authority by the defendant to rent the premises on his account, and for his benefit, and they were so rented. Nothing can be more obvious than that, if McFarlane had been in such a condition that he could have given to Weston a lease in the name of Farrell, the defendant, the new letting could have in no wise affected the plaintiff's rights. But Farrell had gone to Europe. His agent, Mr. Wight, requested McFarlane to lease the premises. The tenant would reasonably expect a lease from some person who had some title to give. In

those circumstances, compliance by the plaintiff with the request of the defendant, to give the lease to Weston, and so secure a letting for the defendant's benefit, ought not to be regarded as a discharge of the defendant from liability for the residue of the rent. So to hold would be doing violence to the manifest intent of the transaction and the understanding of all parties. It was but a reletting for the defendant's account and risk, done in good faith, by his express authority, for his own account and for his benefit as a reduction of his liability. As to this defendant, the reletting should operate no more to the prejudice of the plaintiff than if it had been done in pursuance of an original authority reserved to him in the lease, to relet the premises in case of default by the first lessee, and apply the proceeds of the reletting in reduction of the rent originally reserved.

The circumstance that McFarlane's connection with the transaction grew out of his agency for the plaintiff does not affect this view of the subject. If McFarlane be regarded as the plaintiff's agent, still the new lease was made in consequence of the defendant's request that the premises should be relet for his benefit. If such request was made to the plaintiff's agent, then it was in law a request to the plaintiff, and the case then is, that Farrell, the defendant, being liable for the full rent, and the premises being unoccupied, requested the plaintiff to relet them. He could not in this aspect of the case have expected the plaintiff to relet them in his (Farrell's) name, but only that he let them for his benefit, in so far as the rent reserved and thereby obtained might satisfy his liability.

And on the other hand, if McFarlane be regarded as acting, not as the plaintiff's agent, but as agent for the defendant, (as he himself states and evidently understood his relation to the transaction,) then he did procure a tenant for the defendant, agreed upon the rent, and his request to the plaintiff and procurement of the lease to Weston in pursuance of the defendant's authority, was tantamount to a direct request by the defendant himself to the plaintiff and an authority to the plaintiff to give the lease and look to Farrell for the deficiency of the rent.

The plaintiff has therefore done nothing in all this, except at the defendant's request, with a view to his relief. All has been done in good faith, and done discreetly with reference to the

defendant's interest in the matter. Such a transaction, we think, cannot operate either legally or equitably to discharge the express covenant of the defendant.

It is further insisted, however, on this appeal, that the instrument upon which the action is brought was executed upon a consideration already past, to wit: in consideration of a previous lease already executed and delivered to the original tenant, Newman. That a past consideration is not sufficient in law to uphold an agreement of guaranty, and that, therefore, the defendant is not and never was liable to the plaintiff for the rent sued for.

The instrument upon which this action is brought is an undertaking to answer for the default of Edward H. Newman, the plaintiff's lessee.

Such an undertaking, to be valid and binding, must be in writing, and in some form it must express the consideration, either in words or by a form that as matter of law imports consideration. (2 R. S., 135.)

An instrument, under seal, is held not void under the statute, although no consideration is in terms stated therein, upon the ground that the seal imports consideration. It is sufficient, if upon the face of the instrument consideration is a necessary legal implication. (*Maghee* v. *Kellogg*, 24 Wend., 32; *Bush* v. *Stevens*, id., 256.)

And it is, therefore, said that an instrument under seal is not within the statute of frauds. (*Barnum* v. *Childs*, 1 Sandf. R., 58; 11 Barb. S. C. R., 14, and cases therein cited.)

The instrument in question expresses a consideration by its terms, and is also sealed by the defendant. There is, therefore, no pretence or claim that it is invalid within the statute of frauds.

It purports to have been entered into "in consideration of the demise of the premises above mentioned," (*i. e.*, the demise contained in the instrument underneath which it was written,) to the "party of the second part," *i. e.*, to the party to the lease, who was not a party to the underwriting.

It bears the same date as the lease, and is attested by the same witness. By reference, it is made to form a part of the same transaction. Its most obvious import as well as the natural inference from what appears upon the two instruments is that they were executed simultaneously, and that the giving of the

lease was the inducement to the execution of the instrument of guaranty, and constituted the consideration thereof. And such a consideration is sufficient.

Although the form of words employed in the instrument is not best adapted to express a present consideration, we are clear that it does not necessarily import that the consideration is past, and that the demise had already been executed and delivered; but that the more natural signification is, as already suggested, that both were one transaction. That the giving of the lease was the consideration moving the defendant to execute the instrument, and the execution of the instrument by the defendant was one of the considerations moving the plaintiff to execute and deliver the lease to Newman.

The plaintiff was, therefore, entitled to maintain an action on the instrument, and the suggestion of the defendant's counsel that the instrument was founded upon a consideration already past, and that it is therefore *nudum pactum* is not warranted by the instruments themselves, nor by any proofs given at the trial.

The instruments, therefore, and the other proofs given on the trial, sustain the plaintiff's claim, and entitle him to recover. And had there been no recital or mention of consideration in the instrument executed by the defendant, the plaintiff would still be so entitled because the seal imported consideration sufficient in law to sustain the covenant. And although the seal is not now conclusive, still its *prima facie* import must prevail unless the defendant gives evidence to destroy the legal implication.

It is, however, urged that the plaintiff has, in the complaint itself, stated that the instrument was executed after the lease to Newman was made and concluded, and has thus by his own admission shown that the consideration was wholly past, and therefore insufficient to sustain the covenant.

The case of *Barnum* v. *Childs*, above cited, would seem, if followed to the full extent, to warrant us in saying that the seal to the instrument carried with it such a legal implication, that although the consideration mentioned was a previous lease already executed, still the seal was *prima facie* evidence of some sufficient consideration for the defendant's covenant that the rent reserved in such lease should be paid; and the sealing having been averred in the complaint and proved on the trial, that this was

enough to put the defendant to proof that there was in fact no legal consideration.

But, as already observed, the fair and reasonable inference from the instruments is, according to their natural and sensible construction, that they were executed simultaneously. The giving of the lease to Newman being the inducement to the defendant's covenant, and this is sufficient to uphold it, whether the seal *prima facie* imports other or further consideration or not. The defendant on the trial not only failed to give any evidence showing a want of consideration, but no suggestion was made that consideration enough was not proved by the instruments themselves. Under such circumstances, although the form of words used in the complaint is susceptible of a construction indicating that the only consideration for the covenant was a previous lease already concluded, we ought not to give it such a construction and send the parties to a new trial, or put the plaintiff to a new suit, unless the complaint is so bad in substance that the discrepancy between the allegation and the proofs must be treated as a fatal variance.

The proofs were received without objection, and a sufficient cause of action is made out. If the words of the complaint may be read consistently with such proofs, it is our duty so to read them. The only ground of the objection lies in the language, "the lease having been so made and concluded," "the defendants afterwards in consideration of the demise, &c., covenanted, &c." It is doing no violence to this language, when we bear in mind the facts which did sufficiently appear on the trial, and the rule of the Code that pleadings "shall be liberally construed with a view to substantial justice between the parties," (Code, § 159,) to say that the pleader did not by these words intend, and was not understood by the defendant to mean that the lease to Newman had been executed and delivered before the guaranty was made.

And even if the more natural construction of this language be, (as we think it is,) that the lease was in order of time completely finished before the guaranty was made, still we think that the erroneous statement in this respect should not now estop the plaintiff to insist upon his rights according to the truth of his case, as sufficiently proved without objection. In this aspect the

error in the statement is only a variance, which has not misled the defendant, and which might be either amended or disregarded.

Our conclusion is that the plaintiff should have judgment upon the verdict.

Ordered accordingly.

SAMUEL HARRIS & SONS *v.* MOODY & TELFAIR.

1. Jettisoned goods carried on deck, according to the custom of the trade by steamboats navigating the Sound that separates Long Island from the main land of New York and Connecticut, and stowed in the usual way, are entitled to contribution for general average loss.
2. Bank bills of the plaintiffs, so carried for them in a crate by an Express Company, which, by agreement with the owners of the steamboat, paid such owners a fixed annual sum for the carrying of a stated number of portable crates with the contents thereof, are bound, when saved, to contribute for such a loss.
3. The bills, in the absence of proof to the contrary, will be presumed to be of the value expressed on their face, and must contribute in proportion to the amount of such value.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, December 15, 1858; decided, February 19, 1859.)

THIS action comes before the Court on questions of law, arising at the trial, and which were there ordered to be heard in the first instance at the General Term.

It was tried before Mr. Justice SLOSSON and a jury, on the 21st of June, 1858. It is brought to recover the possession of a package of bank bills.

The complaint states that the defendants have become possessed of and wrongfully detain one package of bank bills, the property of the plaintiffs, amounting to $1,171, "said package being sealed in an envelope and marked "$1,171," and directed to "J. W. Clark & Co., Boston, Mass.;" a demand of the package from the defendants; their refusal to deliver it; that it is of the value of $1,171; and prays judgment that the defendants deliver the pro-

perty to them; and for damages ($500) for the detention, and costs of suit.

The answer admits the defendants' possession of the property, a demand of it, and their refusal to deliver it; but denies that their detention of it is wrongful.

It also alleges that, on the 17th of October, 1856, the steamboat Connecticut left the port of New York for Allyn's Point, Connecticut, staunch, tight and strong; having on board many passengers and a large and valuable cargo; that while pursuing this voyage she encountered a heavy gale, and was much injured; that it became necessary for the general safety to throw overboard some twenty-five tons of her cargo, which was done, whereby she was enabled to enter Huntington harbor, and was saved, with the residue of the cargo; that the cargo jettisoned was of the value of over $15,000; that the loss caused by such jettison is the subject of a general average contribution; that the said package of bills, which was saved, is liable to contribute; that they received and hold such package as agents of the owners of said steamboat, to secure the payment of its contributory share, and which is alleged to exceed $200; that they have offered to deliver the package to the plaintiffs, provided they would agree to pay the general average properly chargeable thereon; but that they refused to pay, or to agree to pay, any part thereof, insisting that the bank bills are not the subject of general average, and were exempt therefrom. It prays judgment that the bills be returned to them, and that the plaintiffs pay damages for the taking and detention thereof, with the costs of the action.

The entire testimony given and proceedings had at the trial were as follows, viz.:

The following stipulation was read in evidence by counsel for the defendants:

"It is stipulated and agreed, by and between the parties to this action, that the steamboat 'Connecticut,' on a voyage from New York to Allyn's Point, on the afternoon and evening of the 17th October, 1856, encountered a heavy gale, whereby she sustained great damage, losing her smoke stack and forward mast, and being greatly strained and injured. That the storm continued unabated, and it was evident that the vessel would go down unless she could be brought around; and in order to do this

it became and was necessary, for the general preservation, to lighten the boat; and in consequence thereof, with a view to the general safety, a large amount of cargo was jettisoned, by means whereof the steamboat was enabled to turn, and finally to enter Huntington harbor in safety, whence she was brought to New York on the succeeding day.

"That the cargo which was jettisoned was not under cover, but, according to the established usage and custom of the trade by steamboats running between New York and Allyn's Point, was carried on the main deck of the steamer; the space below that deck being, as usual, occupied by the engine, boilers, coal, &c., and by the passengers.

"That most of the cargo jettisoned was laden upon the upper or main deck of said boat along each side of the ladies' cabin, and between the stern of the boat and the paddle boxes, being the space, according to usage and custom, appropriated to cargo. A cabin is built upon the said deck, and occupies a space in the centre of the vessel, and equi-distant from each side of the boat, and between the sides of the cabin and the sides of the boat the said cargo was stowed.

"That the bank bills, for the recovery of which this action is brought, belonged to the plaintiffs, and were by them entrusted and delivered, at Baltimore, to Adams & Co.'s express agents and forwarders, to be by them transported to and delivered at Boston to the plaintiffs' agents, and that said bills were in a crate or case belonging to Adams & Co., which was laden on board the said vessel at the time of the said jettison.

"That by the agreement between Adams & Co. and the owners of said steamboat, the said Adams & Co. were, in consideration of a fixed annual sum, permitted and allowed to transport on said boat, a stated number of portable crates, with the contents thereof; and the said Adams & Co. made and collected their own charges for the transportation of the contents of the said crates from the parties who employed them.

"That the owners of the said boat, claiming that the said bills were liable to contribute in common with the other property saved to the payment of the general average loss occasioned by said jettison, retained the said bills and delivered them to the defendants in this action, who were, at the commencement thereof, in

the possession of the same, as the agents of the said owners, to secure the payment of the contributory share of such general average loss for which the said owners and said defendants insisted that the said bills are liable to contribute, as part of the cargo of the vessel.

"Dated June 19th, 1858."

"It was admitted that the bank bills mentioned in the complaint were, upon the requisition of the plaintiffs, taken from the possession of the defendants, and delivered to the plaintiffs.

"The testimony hereupon closed; the counsel for the defendants thereupon insisted, as matter of law, that on the facts admitted the property in the complaint mentioned was liable to contribute to the payment of the general average loss occasioned by the accident, in the pleadings and stipulation mentioned, and that the defendants were rightfully entitled to hold and retain the said property, and that they were entitled to a verdict. The Court so decided, and directed the jury to find a verdict for the defendants. To such decision and direction the plaintiffs' counsel excepted. The jury, under the direction of the Judge, rendered a verdict in favor of the defendants, and assessed the value of the property at $1,171, and the damages of the defendants at $134.33.

"And the Court ordered that the questions of law raised on the said trial, and the plaintiffs' exceptions, should be heard in the first instance at General Term, judgment in the meantime to be suspended."

J. E. Burrill, for the plaintiffs.

I. The cargo jettisoned was stored on deck, and is not entitled to the benefit of general average. (Abb. on Ship., part IV., ch. X., sub. 3, p. 481; Stev. on Av., 65; *Smith* v. *Wright*, 1 Caines' R., 43; *Dodge* v. *Bartol*, 5 Greenl. R., 286; *Cram* v. *Aiken*, 13 Maine R., 229; *Sproat* v. *Donnell*, 26 id., 185; *Lenox* v. *United States Ins. Co.*, 3 Johns. Cas., 179.)

II. Bank notes, by reason of their peculiar character, are exempt from liability to the payment of a general average loss.

1. A loss occasioned by jettison is chargeable on the ship, freight and cargo, and the principle on which it is so chargeable, is, that without the sacrifice of the property jettisoned, the particular contributory interest would have perished, and that by

means of such sacrifice, and by it alone, was such contributory interest saved, or, in other words, that the property sacrificed was the price of safety of that which is made to contribute to its payment. (3 Kent's Com., Lec. 47, pp. 233, 234; *Williams* v. *Suffolk Ins. Co.*, 3 Sumn. R., 270, *Scudder* v. *Bradford*, 14 Pick, 13; *Bradhurst* v. *Columbian Ins. Co.*, 9 Johns. R., 9; 2 Phil. on Ins., §§ 1293–1298.)

2. Bank notes are the mere evidences of debt, which debt is not impaired by the loss of the evidence, and which evidence, in case of loss, may be supplied by other evidence equally good. (2 Phil. on Ins., § 1397.)

3. Title deeds, bonds and mortgages and choses in action, are necessarily exempted from contribution, and on principles which apply equally to the exemption of bank notes.

All the books, in speaking of articles liable to contribute, allude to goods, chattels and money, and in speaking of money, refer to gold and silver coin. (2 Phil. on Ins., §§ 1393–1398; 1 Park on Ins., ch. 7, § 2, p. 293; Abb. on Ship., 502, part IV., ch. X., sub. 12; *Hill* v. *Patten*, 8 East. R., 375; *Brown* v. *Stapyleton*, 4 Bing. R., 119; Stev. on Av., ch. VI., art. 1, p. 206.)

III. Under the arrangement between Adams & Co., and the owners of the Connecticut, the bank notes in question paid no freight, and did not form any part of the cargo of the vessel, and on that ground are exempted from liability to contribution. (Abb. on Ship., 502; 4 Bing., 119; 8 East. R., 375; Stev. on Av., ch. VI., art. 1, p. 206.)

IV. The plaintiffs were entitled to judgment.

Francis B. Cutting, for the defendants.

I. The bank bills were packed in a crate or case, and transported as merchandise for hire. They became a part of the regular cargo of the vessel. As such cargo, they were liable to contribute to the general average loss which occured.

1. Money, bills of credit, choses in action, &c., are only excepted, when carried like clothes and baggage under the personal care of a passenger or seaman; and not when carried as cargo for hire, or when they are to be saved or lost like other cargo, merely from the general care and conduct of the persons controlling and managing the vessel. (2 Arn. on Insurance, 919, and

authorities referred to; 1 Phil. on Insurance, 2d ed., 172, and cases cited; 2 id., 2d ed., 152; 3 East., 375; *Thomas* v. *Royal Exchange Association Company*, Man. Dig., 164; *h. i.* No. 5; *Peters* v. *Milligan*, Park on Ins., 211; Mil., 244; *Brown* v. *Stapyleton*, 4 Bing., 119; Stev. & Ben., 206, 248; Emer. on Insurance, Mer., ed., 492, 497.)

2. A steamboat becomes a common carrier of money or bills, the same as of other property, when it takes one of these express crates, filled, as is well known, with small parcels of value. (11 John. R., 109; 2 Wend., 339; 6 How., 344.)

The owners being responsible for negligent losses of the crate with all its contents as cargo, should have the like inducements and compensation to save it from sea perils. There is no principle upon which it can be excepted.

3. The plaintiff seeks to maintain replevin for the bills as a distinct parcel; (not as so much money for which the defendants as agents would be answerable only to their immediate principal.) He thus concedes and treats the parcel as merchandise.

4. The bank bills are not shown to be uncurrent, and are not to be treated as mere choses in action or evidences of debt. They are payable to bearer, and used as a currency; and could be levied on as goods. (13 Wend., 102.)

II. The jettison from the main deck of the steamer, the recognized and only place for carrying freight in such a vessel by established usage, was not subject to the exception applied to goods "carried on deck" of a sea-going sailing vessel. The exception itself is not absolute and universal; but governed by the customs and usage of vessels on the voyage for which they are shipped. The upper deck is not required to be so strong or close as on the ocean; and the crate was not in any place affecting the management of the vessel, nor subject to peculiar exposure to a jettison. (2 Arn., 888; Abb., 481, 482; Valin., tom. 2, p. 189, [goods in open boats or small vessels;] *Da Costa* v. *Edmunds*, 4 Camp., 142; *Gould* v. *Oliver*, 4 Bing., N. C., 135; *Milward* v. *Hibbert*, 3 Queen's Bench, 120; *S. C.*, 2 Gale & Davis., 142; *Harley* v. *Milward*, 1 Jones & Cary, 224, 229.)

[Even if otherwise, it only affects the amount of general average. The vessel had to bear away to a port of necessity, and

goods on deck, when not contributed for, must contribute to a general average loss.]

III. There was no tender of payment or security, nor authority given to open the package and separate and retain a part; nor does it appear when the demand was made; so that no question arises but the naked one, whether there was a lien for a general average loss, of which there can be no doubt. (3 Sum., 308; Abb., 508; marginal page and notes to Story & Perkins' ed., and authorities there referred to.)

IV. The defendants are entitled to judgment.

PIERREPONT, J. This case comes before us by direction of the Judge below, and presents the following facts:

The steamboat "Connecticut," on her voyage from New York to Allyn's Point, on the 17th of October, 1856, encountered a heavy gale, and for general safety it became necessary to throw a large amount of her cargo overboard. Most of the cargo jettisoned was stowed on the main deck, in accordance with established usage of the trade by steamboats running on the Sound.

The space below the main deck was, as usual, occupied by the engine, boilers, coal, &c., and by passengers.

Upon the deck was a crate of Adams & Co., express agents and forwarders. In the crate was a package of bank notes belonging to the plaintiffs, amounting to $1,170, which they had entrusted to Adams & Co., to transport to Boston for hire.

By agreement between Adams & Co. and the owners of the steamboat, Adams & Co. were allowed to transport on said boat a stated number of portable crates with their contents, and for this privilege they paid the owners of the boat a fixed annual sum, and Adams & Co. collected their own charges for whatever they transported in the crates.

The owners of the boat, claiming that the bank bills saved were liable to contribute in general average towards the loss occasioned by the jettison, retained the bills to secure the payment of their contributory share of such loss. The plaintiffs brought this action to recover the bills.

This case presents the important question touching the liability of goods stowed on the deck of a steamer, to contribute in gen-

eral average for jettisoned cargo. The necessity of the jettison is admitted, and the jettisoned goods were stowed on deck.

Laws were written upon the subject of general average contribution for jettisoned cargo before the Roman Code, and the law of ancient Rhodes was transplanted into the Roman law, and appears duly accredited in the Pandects of Justinian. (Digest, lib. 14, tit. 2, ch. 2.)

The Digest states it thus:

"*Lege Rhodia cavetur, ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*"

If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contributions of all. But ancient as is the law upon this subject, an embarrassment arises out of the distinction made between deck-stowed goods and other cargo; and it must be confessed that the law yet remains in some confusion.

Chancellor KENT says (without qualification): "Goods shipped on deck contribute, if saved; but if lost by jettison, they are not entitled to the benefit of general average; for they, by their situation, increase the difficulty of navigation, and are peculiarly exposed to peril." (3 Kent Com., 240, and cites *Smith* v. *Wright*, 1 Caines' R., 43; *Lenox* v. *United States Ins. Co.*, 3 Johns. Cas., 178, and other authorities, in support of that doctrine.)

In Abbott on Shipping, we find it stated thus: "The French ordinance in express terms excludes from the benefit of general average, goods stowed upon the deck of the ship, and the same rule prevails in practice in this country." (Abb. on Ship., 482, citing many authorities.)

Judge STORY says: "Our law is the same. A jettison of goods stowed on deck cannot be brought into general average." (In note to Abbott in his edition.)

Bell, in his Commentaries upon the Laws of Scotland, says: "Goods stowed on deck, and thrown overboard, are not to be relieved by contribution." (Vol. 1, p. 586.)

In Kent's Commercial and Marine Law, 231, it is said: "Goods shipped on deck are not entitled to the benefit of general average, if lost."

The reason assigned for this rule, is, that goods thus stowed tend to embarrass the navigation of the vessel, and to increase the danger. The American authorities are numerous and seem to sustain the above rule. (*Cram* v. *Aiken*, 13 Maine R., 229; *Sproat* v. *Donnell*, 26 Maine R., 185; *Barber* v *Brace*, 3 Conn., 9; *Dodge* v. *Bartol*, 5 Greenl., 286; *Hampton* v. *Brig Thaddeus*, 4 Martin N. S., [Lou.,] 582; *Lenox* v. *United States Ins. Co.*, 3 Johns. Cas., 179; *Smith* v. *Wright*, 1 Caines' R., 43.)

Mr. Arnould, however, says: "That goods carried on deck are not contributed for if jettisoned, unless they are so carried according to the common usage and course of trade on the voyage for which they are shipped; but that on proof of such usage, they are contributed for like other goods." (2 Arn. on Ins., 888.)

And in *Gould* v. *Oliver*, (4 Bing., N. C., 135,) it was held that goods laden on deck, according to the custom of a particular trade, are entitled to contribution for a loss by jettison.

In the case of *Milward* v. *Hibbert*, (3 Queen's Bench, 120, S. C.; 2 Gale & Davis., 142,) it appears that a quantity of pigs, in the course of a voyage from Waterford to London, were thrown overboard from the deck where they were stowed. It was insisted that for the deck-stowed pigs no contribution could be claimed. The Court held otherwise. Lord DENMAN, in pronouncing the opinion of the Court, makes the following very pertinent remarks: "The practice appears to have been, not to lay it down as a rule of law, that for goods stowed on the deck the owner of them shall be excluded from the benefit of general average, but to receive the evidence of commercial men respecting the usage of the trade, and the general understanding of those engaged in it, (and in insuring,) *which may obviously vary and require, from time to time, fresh evidence and different explanations.*"

These views of Lord DENMAN will, I think, commend themselves to every man of business knowledge or good sense.

The old rule was established when all vessels were propelled by sails, and when there was no machinery in the hold of the ship; but the introduction of steam into marine service, has wrought great changes in the situation of the motive power, and has rendered the steamboat deck the fitter place for the stowage of cargo. The reason of the rule has ceased, and the rule should perish with the reason. In the common law there is

a wise flexibility which yields to the progress of science and to the changes in the mode of business, and we are prepared to hold that cargo, stowed upon the deck of a steamboat, in accordance with established usage of the trade, must contribute, in general average loss occasioned by jettison, the same as goods stowed elsewhere. (*Harley* v. *Milward*, 1 Jones and Cary, 229.)

The plaintiff contends, under his third point, that under the arrangement between Adams & Co. and the owners of the Connecticut, the bank notes in question paid no freight, and did not form any part of the cargo of the vessel, and on that ground are exempted from liability to contribution.

Adams & Co. paid freight for the crate and its contents, not for the empty crate alone. It would be as reasonable to hold that the goods in boxes paid no freight, but only the boxes. The fact that Adams & Co. paid by the year, can make no difference in the principle of this case.

It was ably pressed upon our consideration at the argument that, as the whole doctrine of contribution for jettisoned goods rested upon the ground "that the property sacrificed was the price of safety of that which is made to contribute," (3 Kent's Com., Lec. 47, p. 233,) it would be most inequitable to make a light package of bank notes more valuable than the whole cargo, (and which could have been taken in the hand from the crate,) contribute in proportion to their value; so disproportionate to the risk and to the real price of safety. And Lord KAMES in his Principles of Equity, (116,) contends that the contributions should be according to weight and not value. But it is now well settled that gold coin and diamonds must contribute. A dollar bill occupies more space than four gold dollars, and a diamond, worth $40,000, occupies scarce the space of ten one dollar bills.

"The general rule is, that all merchandise, of whatever kind, or to whomsoever belonging, contributes according to its value, however small the size or weight in comparison to the value. (3 Kent's Com., 240; Abb. on Shipping, 502, and the numerous authorities cited.)

But this case presents another question of some embarrassment, and about which the books are in direct conflict; and that is, whether bank notes which are not money, but only the evidences of debt are liable to contribute for general average loss. Mr.

Philips thinks they are not liable. (2 Phil. on Insurance, 155, §§ 1397, 1295.) Weskett (an old writer,) thinks they are. (Wesk., tit. Cont., 1.) Arnould makes no positive statement; he says, Weskett's "seems to be the better opinion," but cites no authority.

The industry of the counsel who argued this cause with so much care on either side, did not furnish us with a single decision upon this point, nor have I been able to find one.

By the Rhodian law it was deemed just that all should contribute to whom the jettison had been of advantage, and the amount was apportioned according to the value of the goods. It extended to the apparel of every person, even to the ring upon the finger, though the ring and clothes paid no freight. By the English law personal jewels and wearing apparel do not contribute. (Abb. on Shipping, 503.) Goods, wares, money, jewels and all other property transported as merchandise contribute in proportion to their value. (3 Kent's Com., 240.)

Bank notes are not money, they will not satisfy an execution, they are not a legal tender. Recovery may be had against an individual upon his promissory note lost or destroyed and so also against a bank where the bank note is destroyed; hence it is argued, that the bank bill being only the representative of property or evidence of debt, is not bound to contribute.

In *Handy* v. *Dobbin*, (12 J. R., 220,) the opinion of the Court was delivered by Judge SPENCER, holding expressly that bank bills were goods, and subject to levy on execution. (*Turner* v. *Fendall*, 1 Cranch., 117.)

This action is instituted to recover the possession of personal property, and the plaintiff swears that the package of bills are his goods.

The thief who steals bank bills, finds that the law treats him as though he had stolen goods. If one converts the bank bills of another to his own use, an action will lie as for the conversion of personal property. If one burns or throws into the sea the bank bills belonging to another, an action lies, and the amount of damage is the face of the bills if the bank be solvent. In the absence of all proof to the contrary, the law will presume that the bank notes are worth their nominal value.

We therefore conclude that jettisoned goods, carried on deck, stowed in the usual way, and according to the custom of the

trade of a steamer navigating the Sound, are entitled to contribution for general average loss.

That bank bills, so carried in a crate by an express company, for hire, are to be treated as other goods, and are bound to contribute when saved.

And that, in the absence of proof to the contrary, the value of the bills is the amount expressed upon their face, and contribution must be made proportionate to that value. And hence, that in this case, judgment should be entered for the defendants, with costs.

HOFFMAN, J. The case is an interesting and a new one. We are indebted to the counsel on both sides for the care with which it has been brought before us.

Can bank bills be made to contribute in general average under any circumstances? Can those of the plaintiffs be made to contribute in this particular case? Such are the questions to be solved. I shall consider, in the first place, the facts in this particular action, and the points raised upon them.

1st. The contract which was made between the plaintiffs, and the Adams' Express Company in Baltimore, constituted the latter the agents of the plaintiffs, and made the mode of transportation pursued by that Company precisely the same, as to all obligations and rights, as if prescribed or sanctioned by themselves. Especially is this the case, when these agents pursued, in this instance, their ordinary method and means of transportation. The case of the *N. J. Steam Nav. Co.* v. *The Merchants' Bank*, (6 How. U. S. R., 344,) settles this point.

The cargo which was jettisoned was on deck; but was there according to the established custom of steamboats between New York and Allyn's Point. It is true that, by the general maritime law, goods stowed upon the deck are not the subjects of general average when jettisoned. (Abb. on Shipping, 481, 8 ed., and Mr. Shee's note; Emer., p. 492; *Dodge* v. *Bartol*, 5 Greenl., 286; *Lenox* v. *United Ins. Co.*, 3 Johns. Cas., 178.)

But when the goods are transported coastwise in a steamboat; when the usage is uniform to carry all, or the bulk of the cargo on deck, the space under being appropriated to the machinery and other purposes; and when that usage is so general that con-

structive notice of its prevalence may be inferred in all, deck goods thrown over are as much to be contributed for as goods in any other situation. The present case sufficiently falls within this rule.

I have examined with care the following authorities: The ordinance of Louis XIV, and the 421st and 229th articles of the Code of Commerce of France; the exception to the general rule arising from a usage on a coasting voyage, stated by Valin, and the comments of Boulay Paty & Rocron upon it. (Valin, tom. 2, art. 12, p. 189; Boulay Paty, tom. 4, pp. 567–569; Rocron, tit. Avarie, art. 421; *Gould* v. *Oliver*, 4 Bing. N. C., 134; 2 Scott C. B., 241; 2 Man. & Gr., 208; *Milward* v. *Hibbert*, 3 Queen's Bench R., 120; 2 Gale & Dav., 142; *Harley* v. *Milward*, 1 Jones & Cary, 224; *Dodge* v. *Bartol*, 5 Greenl., 286; and *Hampton* v. *Brig Thaddeus*, 4 Martin's Lou. R., 582.) I think the rule I have stated is warranted by them. Such as appear to be hostile may be distinguished on satisfactory grounds.

The reasoning of Boulay Paty, upon the two sections of the Code of Commerce, (421 and 229,) appears to me conclusive; and, I observe, in the *Journal de Palais*, (sup., vol. 1, p. 152, Astor Library,) that a case was decided in the Court of Cassation in 1845, holding that goods carried coastwise on deck were to be contributed for.

2d. The counsel of the defendants next insists that, under the arrangement between Adams & Co. and the owners of the steamboat, the bills in question paid no freight, and did not form any part of the cargo, and on that ground are exempt from liability.

But the fixed annual sum which Adams & Co. paid for the transportation of their crates was in the nature of freight, and the charge for transportation, paid by the plaintiffs, contributed to the payment of that amount. In substance, these bills paid freight.

3d. The next and general question, whether bank bills are liable to contribute in general average, is the material inquiry.

In the first place, we have the great principle of general average, that whatever is saved ought to bear a portion of the loss, of what has perished to procure the safety.

Although the Rhodian law, which was the basis of the Maritime Code of Rome, and is eulogized by Cicero for its wisdom, must be deemed to be lost in its integrity; yet there can be no doubt that the compilation which bears its name is of great antiquity. The very writers who have displaced its high claims, quote it as of an ancient date. (Emer. Pref., 32, and quotations *passim*; see Chief Justice DUER's Lect. on Ins., vol. 1, pp. 24–46.)

By the rule of that Code, everything on board a vessel, even the baggage of passengers, their apparel, and ornaments, though worn upon their persons, was liable to contribute. The writers of the general civil law adopt this doctrine. They are quoted by Emerigon. (Chap. 12, § 42, Mer. ed., 492; Vinnius, p. 211.)

The *Guidon de la Mer* made everything liable, even what the passengers carried about them. (Chap. 5, art. 26.) Their persons were exempted. Duarenus, quoted by Emerigon, declares that it is the general rule that all which has been preserved and is susceptible of being valued, is to contribute to the jettison. In short, the rule of the civil law proper was, that nothing was exempt but provisions intended for consumption, and the persons of free passengers. The pride of the Roman dictated the latter exception, as the person of a freeman was incapable of estimation.

Pothier treats the Code of Commerce, in exempting nothing expressly but the clothes of the crew, as leaving all else liable. (Tit. *des Avaries*, No. 125.) Boulay Paty would distinguish between clothes and jewelry on the person, and those in a trunk or elsewhere. (Tom. 4, p. 562.)

But it cannot be asserted that the civil law rule is now our law. "It is not every object of value which is liable for a contribution of average, but only such things as are termed Merces. Merces has never been held to extend to provisions, but includes only the cargo put on board for the purpose of commerce, and the practice shows that this has been the understanding of all times. Magens, Molloy, Beames, Stevens and other writers all expound the word Merces in this way. They concur in saying, that things of little weight, but of considerable value, must contribute, if they belong to the cargo, but not if they belong to the passengers." "The rule is, that all merchandise put on board for the purpose of traffic, is liable to be brought into contribu-

tion; and in merchandise is included all property of great value, unless attached to the persons of the passengers, but property so attached does not contribute."

These are the positions of BEST, Ch. J., and PARK, J., in *Brown* v. *Stapyleton*. (4 Bing., 119.)

And in *Peters* v. *Milligan*, (cited in Park on Ins., 211,) it was held that gold, silver, jewels and precious stones contribute. (Abb. on Ship., 502; 2 Arn. on Ins., 919.)

Weskett on Insurance, (Tit. Contrib., No. 1,) says, that bank bills ought to contribute a part to make up a loss from jettison.

Mr. Phillips (vol. 2, p. 149, art. 1397,) refers to this authority, and observes: "But as these are not so properly actual property as the evidence of demands, which evidence may be supplied by other, in case of their being lost, if sufficient precautions are taken by the holder to prove what notes they were; this circumstance distinguishes them from specie or other property, which is usually made to contribute."

This is all the authority I have found directly to the point.

There is another general rule which may be invoked to assist us. Magens states, that what does not pay freight, does not pay average. (Vol. 1, p. 62.) This may be sometimes unjust, and probably is not an unexceptionable rule. Goods of the master, not paying freight, ought to contribute. (Stevens, part 1, ch. 1, p. 52.)

But the converse of the rule may perhaps be unexceptionable. What does pay freight ought to contribute.

But the main argument of the plaintiffs' counsel remains. Nothing was saved in saving the bills. No damage would have occurred to the plaintiffs had they been lost. They were not property, the destruction of which was irretrievable. They were evidences of debt, which debt could be established by other proof. It is substantially the view presented by Mr. Phillips.

But is this so? Was it nothing to save these bills from going to the bottom? According to the rule of the Supreme Court of our State, as stated by Justice MARCY, if a bank bill be lost to the owner, he cannot recover, but if destroyed, he may. (6 Wend., 378.) Yet that recovery depends upon his ability to prove destruction, ownership and identity. It is inevitable that some damage, delay and difficulty must in all cases arise to him.

Proof must be given. From this he is saved by the preservation of the bills. The bank might be justified in demanding either delay, to ascertain whether efforts to recover the property would not be available, or indemnity. Nothing but an equity suit would, perhaps, then avail. (See Will. Eq. Jur., 52, 54.)

We have, in this case, bills of a bank carried as part of the cargo, paying what is in truth freight for the transportation, and exposed in the crate to as much risk of loss as any part of the cargo—certainly as much as any costly articles, such as laces, contained in the crate—I cannot but think contribution ought to be made. It is not necessary to say, and it does not inevitably result, that because the bills should contribute they would be the objects of contribution if sacrificed.

The general rule undoubtedly is, that contribution and to be contributed for, are convertible obligations and rights; but this rule is not without exceptions. The clothes of sailors are exempt, and yet are to be paid for if cast overboard. Munitions of war and provisions appear to be governed by the same rule. (Emer., ch. 12, § 42; Mered. ed., 493, 494.) Perhaps there may exist a distinction in the case of bank bills. At any rate, upon a question so very new, I think it should be left for a decision when necessary.

The defendants are entitled to judgment.

MONCRIEF, J., concurred in ordering judgment for the defendants.

Judgment accordingly.

ALEXANDER A. NEVINS, Plaintiff, *v.* THE BAY STATE STEAMBOAT COMPANY, Defendants, (cross-appeals.)

A common carrier by steamboat and railroad, received the trunks of a traveler, without question or objection, deposited them for carriage in crates, and delivered to him checks therefor. He then presented himself at the ticket office, paid his fare, and received a passage ticket consisting of two parts, one to be surrendered to the conductor in the railroad cars, the other portion to be used and surrendered in the steamboat. On this passage ticket the following words were printed: "☞ Passengers are not allowed to

carry baggage beyond $100 in value, and that personal, unless notice is given, and an extra amount paid, at the rate of the price of a ticket for every $500 in value." On the journey one of the trunks was lost, containing wearing apparel and articles of ordinary baggage, of the value of $690, and other property of the value of $730:

1. *Held*, that notwithstanding the memorandum printed on the ticket, the plaintiff is entitled to recover the value of his trunk and of such portion of the contents as is customarily known and carried as travelers' baggage, being reasonable in amount and value, although worth more than $100, and although nothing extra was paid for baggage exceeding in value that sum. In considering what amount of baggage the plaintiff might reasonably have had, the jury might take into view his residence, business, station in life, the place from which he came, and whither he was going.
2. The carrier is not liable for jewelry in the traveler's trunk, purchased by the latter, and intended as presents for his friends, nor for masonic regalia, nor for engravings.
3. Nor will a jury be justified in allowing to the traveler a round sum for articles of jewelry, which he can neither describe nor identify otherwise than as "several articles of jewelry, being presents received, $100."
4. A common carrier may limit his liability by express contract, but not by mere notice.
5. Passage tickets given to passengers by railroad and steamboats, are rather tokens or vouchers that the passengers have paid their fare, and are entitled to their seats, and to be surrendered when that right is recognized, than special contracts fixing and regulating the terms of passage, amount of baggage, &c.
6. It is not negligence in a traveler to go to a hotel in the vicinity of a steamboat landing, and send a servant to the boat for his trunks. The carrier is bound to take care of the trunks for a reasonable time after arriving at the wharf.
7. No rule of law prevents a carrier from prescribing to passengers a tariff of prices varying according to the amount and value of the baggage carried, so as to charge the passenger, having no baggage, less than one who has $100 in value. The only limitation of this right is that the charges be justly and reasonably proportioned to the value of the service rendered and the risk incurred. Per Woodruff, J.
8. An established uniform and notorious usage of business, or an actual notice brought home to the passenger, in such form as to call on him in fairness to the carrier to disclose (when he applies for passage and pays his fare), how much baggage he desires to have carried, or in which class of passengers he desires to be ranked and charged, would exonerate the carrier from any greater liability than such as corresponds to the classification established by him as above stated, and to the rate of compensation received. Per Woodruff, J.

(Before Slosson, Woodruff and Pierrepont, J. J.)

Heard, October 11th, 1858; decided, February 26, 1859.

THESE were cross-appeals by both plaintiff and defendants, in an action tried before Mr. Justice PIERREPONT and a jury on the 12th of May, 1858. The action was brought to recover from the defendants as common carriers, for the loss of the plaintiff's traveling trunk and its contents, under the following circumstances, viz.: The plaintiff, on the 11th day of September, 1855, left Boston for New York by the Fall River route. He had with him as baggage two trunks and a carpet bag. On arriving at the railroad depot in Boston, from the hotel, the baggage was received by the baggage master, and put into the baggage crates or cars. It was checked through to New York, and the plaintiff received three checks, one for each article.

After the baggage was put into the crates, he purchased and paid for his ticket through to New York, and took his seat in the cars. On reaching Fall River he went on board the steamboat Metropolis, owned by the defendants and connecting with the line. The baggage crates were placed on the same boat. The boat landed in the morning near the foot of Morris street, and not far from Delmonico's hotel.

The plaintiff went to look for his baggage, but finding a great crowd and confusion on the boat he went to the hotel, and sent the porter immediately for the baggage; the porter returned with one trunk only, and the carpet bag. The smaller trunk, which contained most of his clothes and various other articles, was missing. He immediately sent the porter back with the check for that trunk, but he returned without it, saying that the baggage master told him he feared it had been stolen, as it could not be found. It turned out that the trunk had been stolen.

It was the plaintiff's usual traveling trunk, and had been repacked by him just before leaving the hotel in Boston, it being his intention to take it with him by land to New Orleans, whither he was bound, and to send the rest of the baggage to the same place by sea.

He locked and strapped the trunk himself, and it was not reopened to his knowledge until delivered and checked at the railroad depot in Boston.

Among the articles contained in the trunk, besides clothing, was a variety of jewelry, the greater portion of which was intended for his own use, and not exceeding in quantity what he usually traveled with, and which he had owned for a year prior

to the loss. There was also a gold watch, and a few articles which were subsequently recovered; also a silver match box, and certain masonic regalia, and jewels which he had then recently purchased; also some jewelry received as presents, which the plaintiff could not describe, which he thought worth $100, some intended for presents, and some engravings.

He usually traveled with his masonic regalia, and had traveled with the identical jewelry which he claimed to have been in the trunk. The value of the entire contents of the trunk, putting the jewelry which he brought with him from Europe at cost prices, was $1,420. An inventory or list of the contents of the trunk was produced on the trial. The defense is twofold.

1st. That the articles claimed were not personal baggage.

2d. That by an express understanding and agreement with their passengers, the passengers were not allowed to carry baggage except for personal use, nor beyond $100 in value, unless notice was given, and an extra amount paid for it at the rate of the price of a ticket for every $500 in value; that these terms and conditions were expressed in the passage ticket received by the plaintiff, and that the plaintiff never notified the defendants that the baggage in question was worth over $100 and never paid any extra amount for baggage beyond $100 in value.

The ticket which the plaintiff purchased at Boston, appears to have been divided into two parts, one to cover the land and the other the water conveyance; the former was given up to the conductor in the cars, and the latter to the collector of tickets on the boat.

Upon the ticket received at Boston was the following memorandum, which was uniformly printed on all the tickets:

"BAY STATE LINE, BOSTON TO NEW YORK.

"☞ Passengers are not allowed to carry baggage beyond $100 in value, and that personal, unless notice is given and an extra amount paid at the rate of the price of a ticket for every $500 in value."

There was no evidence that the plaintiff had read this memorandum, the defendants relying on the assumption that he must have read it, it being on his ticket, or that if he did not read it then there was negligence on his part, and that he must be chargeable with knowledge of the contents of it.

The Judge charged the jury:

"That the plaintiff was entitled to recover his reasonable personal baggage put on board the boat, unless the Company was excused by a contract with him; but that the ticket was not a contract limiting the responsibility of the Company, it was only a notice.

"That the amount claimed as reasonable personal baggage was very large, but that in considering what amount of baggage the plaintiff might reasonably have had, the jury might take into consideration his residence, business and station in life, and the place from which he came, and whither he was going.

"That if the plaintiff were a poor laboring man going from Boston to New York, such an amount of jewelry as the plaintiff claimed, it would not be reasonable for the Company to suppose that he had, but that a rich person living in New Orleans, who had been traveling in Europe and was on his way home, would naturally take a larger amount. The law does not fix any precise limit to the jewelry a man may wear, and travel with, except that it must not be unreasonable in amount.

"That if the plaintiff was negligent in looking after his baggage when the boat reached New York, he was not entitled to recover; but that it could hardly be negligence to go to a hotel in the neighborhood, when the boat landed, to get a porter for his trunks as detailed in the evidence; that the Company was bound to keep the baggage a reasonable time until he called for it.

"That the plaintiff was not entitled to recover for presents intended for friends."

To which latter charge the plaintiff's counsel excepted.

"Nor for the silver match box, unless the jury believed it reasonable personal baggage, which the Court did not."

To which latter charge plaintiff's counsel duly excepted.

"Nor for masonic regalia."

To which latter charge plaintiff's counsel duly excepted.

"Nor for engravings."

To which latter charge plaintiff's counsel duly excepted.

"Also, that he was not entitled to recover for the presents received from his friends, and which he did not specify.

"That if the plaintiff was entitled to recover, he was entitled to interest from the time of the loss."

The defendant's counsel excepted to all and every part of the said charge except that part in which his Honor denied the plaintiff's right to recover sundry articles; and the plaintiff's counsel excepted to the part last mentioned.

The jury found a verdict for the plaintiff for $690, being the assessed value of the articles which the Court instructed them were proper subjects of recovery; and computed the interest on said amount from the commencement of the action at $128.80, making, altogether, the sum of $818.80. Judgment was entered on the verdict and both parties appealed from the judgment.

Jeremiah Larocque, for the plaintiff.

I. The instruction of the learned Judge to the jury, "that the plaintiff was entitled to recover his reasonable personal baggage put on board the boat, unless the Company was excused by a contract with him, but that the ticket was not a contract limiting the responsibility of the Company; it was only a notice," was correct. (*Dorr* v. *The N. J. Steam Nav. Co.*, 1 Kern., 485.)

1. The statements and pretensions of a carrier set up in a passage ticket delivered to a passenger as evidence when called for of the payment of his fare, never do make a contract. There is no meeting of minds. The passenger does not understand, when the ticket is delivered to him, that it possesses the attributes of a written contract, or that he is to look to it as containing the limits of the carrier's responsibility. (*McCotter* v. *Hooker*, 4 Seld., 497.)

2. Much less could the carrier impose such restrictions in this particular case, (having already taken possession of the baggage and placed it beyond the reach of the passenger for transportation,) without returning it to him.

II. The instructions of the learned Judge to the jury for their guidance in determining what was reasonable personal baggage, were correct. (*Hawkins* v. *Hoffman*, 6 Hill, 586; *Powell* v. *Myers*, 26 Wend., 591; *Pardee* v. *Drew*, 25 id., 459; *Orange County Bank* v. *Brown*, 9 id., 85.)

III. The instructions as to what did and what did not amount to negligence in the passengers, were also correct.

IV. The instructions of the learned Judge were erroneous as to the articles for which he charged that the plaintiff was not entitled to recover.

1. Presents for friends are, to a greater or less extent, carried by every traveler who has been for some time absent from his family and friends, on his return to them.

2. They are, therefore, within the contemplation of carriers, as articles which they impliedly contract to carry in consideration of the payment of the passage money, in contradistinction from merchandise, samples of goods for sale, and the like, for which a specific contract is to be made as freight.

3. They fairly enter into the definition of baggage, also, as given by the cases.

4. As to amount, they are, of course, to be confined within the same reasonable limits as other baggage.

5. It is not very clear on what principle the silver match box was excluded. A silver match box may have been as appropriate for the use of the passenger on the journey as other valuable articles, which were allowed in view of the plaintiff's circumstances in life.

6. The masonic regalia were eminently appropriate to the convenience of the plaintiff's journey. They were the evidence of the plaintiff's membership in that fraternity, entitling him to the hospitality, aid and protection of the brotherhood in all parts of the world.

Daniel D. Lord, for the defendants.

I. The Judge erred in charging that plaintiff was entitled to recover unless the Company was excused by a contract with him; but that the ticket was not a contract, but only a notice. This charge was erroneous in both propositions.

1. The ticket was a contract—it contained the mode of transportation agreed upon, viz.: Boston to New York, on the Metropolis, on day of delivery only and that bearer was entitled to berth No. 10. Also that Company would assume liability for $100 of baggage, but no more unless extra premium paid, and that they would assume more risk at certain rates.

It was as much a contract as any bill of lading.

If it were in form a notice, it is not less a contract; every contract is a notice of what is agreed on each side.

2. Even if the ticket were only a notice it is sufficient to exempt carrier from all liability for over $100.

(*a.*) It was fully brought to plaintiff's knowledge.

He was bound to notice ticket to see that it was a genuine ticket.

He could not learn either the boat he was to go by or berth he was to occupy without looking at it.

He could not look at it without seeing the terms as to baggage.

If he neglected to read these terms he was negligent, and is not thereby protected from the effect of the notice.

(*b.*) The Company had a right to impose the terms mentioned on the ticket as the conditions of assuming extra liability for baggage.

The only cases in which it has been decided that a carrier cannot limit his liability by notice brought home to the passenger, is, where the notice was an attempt to avoid entirely all responsibility for baggage; but in all these cases it is conceded that the carrier has the right, by notice, to specify the terms on which he will assume liability. (*Hollister* v. *Nowlen*, 19 Wend., 236; *Cole* v. *Goodwin* 19 id., 257; *Orange County Bank* v. *Brown*, 9 id., 115; *Gould* v. *Hill*, 2 Hill, 624.) Judge COWEN held that a carrier could not, even by express agreement, exempt himself from liability for fire, because it was a common law liability, but it was not held that he could not regulate by agreement reasonable terms on which he would assume such liability.

This case cited is not inconsistent with the principle claimed, but is overruled in *Parsons* v. *Monteath*, (13 Barb., 353;) *Moore* v. *Evans*, (14 Barb., 524;) *Dorr* v. *New Jersey Transportation Company*, (1 Kern., 490;) *Holford* v. *Adams*. (2 Duer, 480.)

II. The Judge erred also in charging that jury might consider, in fixing amount of reasonable baggage, passenger's residence, station in life, whence coming and whither going; and that a rich person living in New Orleans, and returning from European travel, might take more than a poor man.

If a rich man pays no more fare than a poor man, he is not entitled to impose any more risk on the Company than he.

III. The Judge erred in charging that it was not negligence to leave baggage in port, and go to a hotel. This should have been left to the jury.

IV. The Judge did not err in charging that plaintiff was not entitled to recover the articles specified in the charge. (*Orange*

Co. Bank v. *Brown*, 9 Wend., 115; *Hawkins* v. *Hoffman*, 6 Hill, 587.)

No contract implied for articles usually carried on the person and not in trunks. (*Pardee* v. *Drew*, 25 Wend., 459.)

BY THE COURT—SLOSSON, J. The question is no longer an open one in this State, whether a common carrier can, by a mere notice, though brought home to the owner of goods, limit his common law liability. Although it was at one time held that he could, it is now abundantly settled that he cannot, and the rule is not confined to the case in which the carrier attempts to excuse himself by notice from all liability whatever, but includes a partial limitation also, so that the proposition may be considered no longer a debatable one, that the carrier cannot limit his liability either in part or whole, by mere notice, though the notice be proved to have been brought to the knowledge of the owner.

On the other hand, it is equally well settled, though this was formerly doubted, that he may limit his liability, in whole or in part, by express contract. (*Orange Co. Bank* v. *Brown*, 9 Wend., 85; *Hollister* v. *Nowlen*, 19 id., 234; *Cole* v. *Goodwin*, id., 251; *Merc. Ins. Co.* v. *Chase*, 1 E. D. Smith, 115; *Dorr* v. *N. J. Steam Nav. Co.*, 1 Kern., 485.)

We do not by this intend to say that the carrier is not at liberty to prescribe reasonable rules and regulations for the conduct of his business, to which the owner of goods or the passenger will be subject, or that a notice of such rules and regulations, involving by their terms even a limitation of his common law liability, may not be so communicated to the traveler as under circumstances to justify the conclusion that he assents to them.

On the contrary, it may well be that a special contract may be predicated on the circumstances under which a notice is brought home to a party, but the circumstances must be such as would justify the conclusion, not merely that the party has knowledge of the notice and its contents, but that he assents to its terms and conditions.

The defendants rely upon the memorandum contained in the ticket received by the plaintiff at Boston, as constituting a special contract with the plaintiff, limiting their liability for baggage to $100 in value. It is impossible to hold this.

We cannot, on principle, regard such a memorandum, or any memorandum, on a passenger's ticket, as constituting a contract between the carrier and the passenger.

These tickets are usually received and paid for in the bustle of a crowd, and it is unreasonable to suppose that the passenger reads and assents to the terms of a memorandum printed thereon; besides they are surrendered to the conductor of the cars or collector on the boat. If contracts, the plaintiff would be entitled to retain them as evidence of his right, as in the case of a bill of lading, until the safe delivery of his baggage. Such tickets are rather tokens or evidences of the right of the passengers to a seat in the cars or accommodation on the boat, from the fact of having paid the fare, and they have fulfilled all their purpose when that right is admitted by the call for and surrender of the tickets. (*Quimby* v. *Vanderbilt*, 17 N. Y. R., 306.)

The utmost that can be claimed for this memorandum is that it was a notice, and as such, even if it be admitted that the plaintiff read it, of which there is no proof, it could not, for anything that appears in this case, create a contract with him.

The price paid for his fare by the plaintiff included the price of the transportation of his baggage.

It is somewhat difficult to define the limit, as to value, within which the liability of the carrier for baggage is to be confined.

The Judge told the jury that "the plaintiff was entitled to recover his reasonable personal baggage," and that in considering what amount of baggage the plaintiff might reasonably have had they might take into consideration "his residence, business and station in life, and the place from which he came, and whither he was going." The plaintiff was a commission merchant, and had just returned from Europe, and was on his way to New Orleans, where he resided.

In *Hawkins* v. *Hoffman*, (6 Hill's R., 589,) the Court say that the implied undertaking to carry baggage "has never been extended beyond ordinary baggage, or such things as a traveler usually carries with him for his personal convenience on the journey, and that the implication cannot be extended beyond such things as the traveller usually has with him as a part of his luggage."

The Court admitted the difficulty of defining what precise articles were within the rule, since some men carry scarcely any

luggage at all, while others take with them a great variety of articles for their convenience; that the articles to be allowed were not to be confined to wearing apparel, and other things usually deemed indispensible, but might well include books carried for instruction or amusement, a gun, or fishing tackle, as such articles are usually carried as baggage.

We understand the rule to be, that the jury, in determining what baggage a traveler is entitled to recover from the carrier in case of loss, may take into consideration what he has been in the habit of carrying in his travels for his personal convenience or use within a reasonable limit, or what a person so circumstanced is ordinarily in the habit of carrying. It is a question for the jury to decide, under all the circumstances.

The Judge instructed the jury that the plaintiff was not entitled to recover presents intended for friends, nor the silver match box, unless the jury believed it to be reasonable personal baggage, nor the masonic regalia, nor the engravings, nor presents received from friends, the particulars of which he could not give.

The plaintiff's counsel insists that none of the articles excluded by the Judge were properly so excluded. We think the Judge ruled correctly as to these articles. It would be difficult to include them within any definition of baggage contained in the books. They certainly are not articles intended for the personal convenience of the traveler, and if presents received by him, the particulars of which he cannot give, and which may therefore be supposed not to have been used on his person, or intended for personal convenience or use, or presents intended by him for his friends, were admitted, it would be almost impossible to lay down any rule of limitation, either as to quantity or value.

As to the masonic regalia and jewels, it is clear that they were properly excluded.

The plaintiff has no reason to complain; after deducting all the items excluded by the Judge, and the articles mentioned in the inventory, which are admitted by the plaintiff to have been recovered back before this suit was brought, the verdict is still $70 more than it should have been. The mistake is doubtless owing to an inadvertence, and were we at liberty to do so, we should direct the verdict to be corrected as it ought to be, but the case does not show that a motion for a new trial was made

at the Special Term, and the appeal to us is from the judgment only. On such an appeal we can only look into the exceptions taken on the trial, and not into the question whether the verdict is sustained in whole or in part by the evidence.

The exception by the defendants' counsel to the Judge's charge is "to all and every part" of it, except that in which he denied the plaintiff's right to recover certain articles.

The exception is too broad. It is abundantly settled that under a general exception to a charge, if any portion of it be correct, the exception must fail. We shall therefore refrain from expressing any opinion on the question of the correctness of the charge, in respect to the plaintiff's negligence, of which a point was made on the argument, or whether the Judge did or did not properly take that question from the jury, though in saying this we do not intend to intimate any doubt as to the propriety of his so doing, under the admitted facts of the case.

For the like reason, we do not deem it necessary to say whether we should or should not wholly coincide in some of the considerations which the Judge submitted to the jury as their guide in determining what was a reasonable amount of baggage for the loss of which the passenger might hold the carrier. A point was made of this on the argument, but abandoned by counsel as not of sufficient importance to incumber the case.

Upon the exceptions properly before us, we are of opinion that the judgment should be affirmed, with costs.

WOODRUFF, J. (1.) Without denying the rule that a common carrier cannot relieve himself from the responsibilities which the common law imposes upon him as a common carrier, by merely giving notice that he will not be so liable, I desire, in order to avoid misapprehension, to say that, in my judgment, the common law does not prescribe the rates or prices, or terms and conditions under which the carrier shall perform his services otherwise than that he shall carry the passenger and his baggage at a reasonable price and under regulations respecting the manner in which the business shall be done which are themselves reasonable. And the law does not forbid the carrier's prescribing regulations designed to protect him against unusual hazards or against imposition or fraud, nor forbid his requiring the payment of rates of

passage varying according to the varying magnitude of the risks he assumes.

I know of no rule of law which prevents a carrier from prescribing to passengers a tariff of prices, according to which he will charge to the passenger who has no baggage a specific sum; to the passenger who carries baggage of the value of $100 an additional amount; to the passenger who carries baggage of the value of $500 a further sum, and so on, increasing the price for passage according to the increase in the value of the service and the hazards of loss. The only limitation of this right is the requirement that the charges be justly and reasonably proportioned to the varying value of the actual service rendered and to the risk incurred. And when it is said that the carrier receives compensation for carrying the traveler's baggage in the price charged for passage money, this is not a denial of the carrier's right to discriminate, and if he please, consent to carry passengers who have no baggage for a less compensation than he charges passengers with baggage; nor when it is said that the carrier who receives passage money is responsible for the safe carriage and delivery of a reasonable amount of baggage, does this proposition deny the right of the carrier to graduate his charges with reference to the actual value of the property the carriage and safety of which he insures.

Whether the carriage be by railroad or otherwise, it is obvious that carrying the baggage of the passengers necessarily involves an expense and risk greater or less in proportion to the quantity and value which each passenger has. Labor, baggage cars, and the watchfulness and care requisite to the secure preservation of the property are proper subjects of compensation, and are obviously an addition to the labor and expense of carrying the person of the passenger only. The duty to carry safely involves the duty to provide secure places for the transportation and proper watchfulness and safeguards to prevent loss. These are proportioned to the value at stake and the consequent hazard, and the right to require a disclosure of the value of the goods and a proper rate of compensation obviously follows from these duties.

But the recognition of the legal right of the carrier to make the discrimination above intimated comes far short of sustaining the claim of the defendants in this case, to be exonerated on the

ground that they placed on the passage ticket the notice given in evidence in this case.

Assuming the discrimination in respect to rates of charge to be just and reasonable, I cannot doubt that an established, uniform and notorious usage of business, or an actual notice brought home to the passenger in such form as to call upon him in fairness to the carrier to disclose, when he applies for passage and pays his fare, how much baggage he wishes him to carry and insure, or in which class of passengers he desires to be ranked and charged, would entitle the carrier to exoneration from any greater liability than such as corresponds with the classification which he has established.

Whether when the baggage is delivered the passenger's attention should be called to the regulation and inquiry be made respecting its value; or whether, if not at that time, it should be done on the application of the passenger for his ticket and tender of his passage money, or in what precise mode a railroad company may so conduct its business as to make it the duty of the passenger to disclose the value of his baggage and pay accordingly, it is not necessary in this case to say. Frankness, fair dealing, and a clear opportunity to act intelligently on both sides are undoubtedly reciprocally due.

When proper notice of such a regulation is given so that the passenger is apprised thereof, or when from the uniform and notorious usage of business, he is chargeable with such notice, it is reasonable and just that he be held bound thereby: and that the carrier may require a disclosure of contents and value and charge accordingly, is not, I apprehend, doubtful, whether he be a carrier of goods or of passengers with their trunks. (See cases cited in *Cole* v. *Goodwin*, 19 Wend., 270; *Orange Co. Bank* v. *Brown*, 9 id., 114; *Wyld* v. *Pickford*, 8 Mees. & Wels., 443; *Batson* v. *Donovan*, 4 Barn. & Ald., 21; *Clay* v. *Willan*, 1 H. Black, 298; *Izett* v. *Mountain*, 4 East., 370; *Mercantile Ins. Co.* v. *Chase*, 1 E. D. Smith, 115, and cases cited; *Stanton* v. *Leland*, 4 id., 93, &c.; *Holford* v. *Adams*, 2 Duer, 471.)

I concur with my brethren in the opinion that the defendants here, having received the plaintiff's trunks, without inquiry, objection or condition, and placed them in their baggage car, and having afterwards accepted his passage money without inquiry

or condition, were not exonerated from responsibility for such property as properly falls within the denomination of a traveler's baggage by the mere fact that the indorsement on the ticket which they delivered to the plaintiff stated that "passengers are not allowed to carry baggage beyond $100 in value, and that personal, unless notice is given and an extra amount paid at the rate of the price of a ticket for every $500 in value."

Nothing was done before or at the time when the trunks were offered to the defendants, or when the plaintiff tendered his fare, which by actual communication to him, gave him notice of any such price or condition upon which the defendants would carry him and his trunks, nor was there evidence of any other facts which can be said to have made it his duty to state the value or contents of his trunks and pay accordingly.

(2.) It seems to me proper also, to observe that so far as the charge to the jury seems to indicate that in determining for what amount of baggage the defendants were responsible the jury might take into consideration the plaintiff's residence, business, station in life, the place from which he came and whither he was going, and whether he was a poor man or a rich man, or where he had been traveling, the charge was not free from exception. If the liability of the defendants depended in any degree upon such considerations, it should appear that they had knowledge of these facts, or some means of knowledge, when they undertook to carry the plaintiff. But I am apprehensive that these considerations do not affect the extent of liability. If travelers practice no fraud or disguise, one may carry as much baggage as another. What is reasonable baggage may be determined independent of any such criteria; and if the claimant have that and no more the carrier is responsible for that, whether the passenger be rich or have no other worldly possessions than his traveling baggage, and whether he have traveled in Europe, or is making his first journey from the most humble birthplace.

On the other hand, if the evidence respecting the actual contents of the traveler's trunks be contradictory and doubtful, considerations showing that his claim to a very valuable outfit was improbable, and tending to impair confidence in his testimony, might perhaps arise out of proof that he was poor, and that the articles claimed were wholly unsuited to his condition

in life or his previous history, and so tend to the belief that his claim was exaggerated in respect to the amount and value of the contents of his trunk. In this construction of the charge, (if it bear that interpretation,) doubtless the considerations to which the attention of the jury was called would not be irrelevant.

Upon this branch of the case, however, my concurrence rests upon the generality of the exception taken to the charge, and on that ground I concur in the affirmance of the judgment.

Judgment affirmed, with costs.

ALEXANDER M. LAWRENCE, Receiver, Plaintiff and Respondent, v. WILLIAM NELSON and WILLIAM NELSON, JR., Defendants and Appellants.

1. A person who takes policies from the General Mutual Insurance Company, a corporation organized under the act of May 25, 1841, (Laws of 1841, p. 229,) and the act of April 6, 1842, amending the same, (Laws of 1842, p. 138,) thereby, by force of the 6th section of the act of 1841, becomes a member of said Company.
2. The said Company became insolvent, and a receiver of its effects was appointed, while notes given by the defendants to the Company for the premiums on policies taken by them from the Company were running to maturity. But before the receiver was appointed, losses had occurred of property insured by some of such policies, which losses had been adjusted by the Company, at sums amounting in the aggregate to $5,393.30. One loss under one policy (on the Galena), was adjusted January 9, 1854, at $3,083.45. In January, 1854, before the policies then outstanding had expired, they were canceled and surrendered by an agreement between the defendants and the Company, indorsed on such policies, by the terms of which agreement the return premiums on said policies, amounting to $2,172.87, were to be paid to the defendants "ratably out of the assets of the Company when divided." The petition for a dissolution of the Company was presented March 10, 1854; its dissolution was decreed Sept. 9, 1854, and a receiver was appointed Dec. 26, 1854: *Held*,
3. (1.) That the defendants must pay to the receiver their premium notes in full. (WOODRUFF, J., dissenting.)
4. (2.) That they could not set off either the $2,172.87, or the $5,393.30, or the item of $3,083.45, (part of the $5,393.30.)

(Before SLOSSON, WOODRUFF and PIERREPONT, J. J.)

Heard, October 6, 1858; decided, February 26, 1859.

THIS is an appeal by the defendants from a judgment entered against them upon the report of E. P. Cowles, Esq., as Referee.

The action was commenced by Mortimer Livingston, Receiver of the General Mutual Insurance Company, as plaintiff, against William Nelson and William Nelson, Jr., as defendants. Pending the suit, Mr. Livingston died, and Alexander M. Lawrence was appointed Receiver in his stead, and by order subsequent thereto, the action was continued in the name of Mr. Lawrence, Receiver, as plaintiff.

The complaint states the appointment of Mr. Livingston as Receiver, and his title as such to the property and effects of the Company, and that as such Receiver he became possessed of six several promissory notes, made and delivered by the defendants to the said Insurance Company, amounting in the aggregate to the principal sum of $2,422.50, describes them and prays judgment for the amount thereof with interest.

The answer admits the making of the notes, and alleges that they were given to said Insurance Company as premium notes for insurances effected by them with said Insurance Company; that upon several of the policies so effected losses were sustained, which said Company acknowledged, to the amount of $5,393.30; that this sum is wholly unpaid; that before the notes (described in the complaint) matured, the said Company became insolvent and ceased to insure, and canceled the policies for which said notes were given, and that there remained unearned of the premiums for which the notes were given, the sum of $2,172.87, which sum, by the canceling of the policies, the defendants became entitled to have, and demand from said Company, which two sums amount to $7,566.17; and that when said Company took said notes, it was insolvent and knew that fact; denies being indebted to the Receiver, and claims a balance due to them from said Company of $5,143.67, besides interest, and prays judgment for that sum.

The said Insurance Company was incorporated by the act of May 25, 1841, (p. 229 of Laws of 1841,) and its powers and the rights and liabilities of its members are prescribed by that act, and the act of April 6 1842, (p. 138 of the Laws of 1842.)

Section 4 of the act of 1841 designates seven persons as Commissioners, and declares it to be their duty "to open books to

receive applications for insurance to be effected by said Company, and as soon as applications amounting to $500,000 shall be received, said Commissioners shall give notice to those persons who have made such applications, of a meeting for the election of thirty-two Trustees; and every person having so made application for insurance, shall be entitled to vote at said election, and the persons chosen at said election shall be Trustees of said Company for the ensuing year."

Section 5 provides for dividing the Trustees so elected into four classes of eight each; one class to expire in one, one in two, one in three, and one in four years, and for filling vacancies.

Section 6 of the act of 1841, declares that "every person having taken a policy during the preceding year directly in his own name, or in the name of his firm, and every person holding in his own name or in the name of his firm, a certificate of the Company, not discharged by payment of losses, shall be deemed a member of said Company, and entitled to vote at all elections. Every person who shall become a member of this corporation by effecting insurance therein, shall, the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the Trustees; and no premium so paid shall ever be withdrawn from said Company, but shall be liable to all the losses and expenses incurred by this Company during the continuance of its charter."

The 7th section prescribes the nature of the securities in which the Company may invest its premiums; and the 8th provides for the annual election of Trustees after the first election, the notice to be given, and the manner of conducting it.

The 9th section of the act of 1841, as amended by the act of 1842, declares that "the officers of the said Company shall, within one month after the expiration of one year from the day on which they shall have issued their first policy, and within the first month of each subsequent year, cause an estimate to be made, as near as may be, of the profits of the said Company during the preceding year;" and after prescribing the mode of making such estimate of profits and its effect, further declares that "the said officers shall thereupon credit on the books of said Company each person or firm who shall have paid any premiums to said Company during the preceding year, with such a portion

of the said net balance * * * * as the amount of earned premiums paid by such person or firm during such year, and not returned, shall be of the whole amount of earned premiums received by said Company during said year, (less return premium,) and shall issue to such person or firm a certificate declaring him or them, and his or their executors, administrators or assigns, to be entitled to a portion of the invested funds of the said Company, equal to the amount so credited to him or them, and also to the receipt annually, out of the interest or income derived by said Company from the investments of said profits, of an interest not exceeding six per centum per annum, which certificate shall contain a proviso that the amount named therein is liable for any future loss by said Company." * *

The notes in suit were not given upon policies issued upon applications for insurance made under the 4th section of the act of 1841, but were given for premiums upon policies issued to the defendants in and according to its ordinary course of business.

The case contained an admission or stipulation, signed by the defendants' attorney, as follows, viz.:

"It is hereby admitted, for the purposes of this trial, that the General Mutual Insurance Company, in making the yearly estimate of net profits, under the provisions of their charter, credited each dealer with such proportion of the net, as the amount of earned premiums received from him was of the whole amount of earned premiums received by the Company during the year, without regard to the fact that the business of such dealer with the Company, for the year, had resulted in a loss to them; and further, that in making such estimate, the premiums and premium notes were in all cases placed and credited to the Company, as earnings, and the return premiums were placed with the losses and expenses, and deducted therefrom to ascertain the net profits for the year.

"I admit the above, at the request of the plaintiff's counsel, but do not admit the relevancy of the testimony, or the correctness of the practice of the Company.

"March 25th, 1858."

The Referee found, as matters of fact:

"1st. That said Company, on the 10th of March, 1854, filed their petition for a voluntary dissolution under the statute for

that purpose made and provided; and that subsequently, and on the 9th of September, 1854, said Company was dissolved by decree of the Court; and on the 26th day of December, 1854, by an order of the Supreme Court, made on that day, Mortimer Livingston was appointed the Receiver under the statute aforesaid, and as such became vested with the assets of said Company, and among them were the notes hereinafter mentioned. That said Mortimer Livingston having departed this life on the 24th of August, 1857, Alexander M. Lawrence was, by an order of said Supreme Court, made, on the 5th day of November, 1857, duly appointed the successor of said Mortimer Livingston, as such Receiver; that by an order of this court, made on the 29th of December, 1857, this suit, which had been commenced by said Mortimer Livingston, as such Receiver, was continued in the name of said Alexander M. Lawrence.

"2d. That this action was brought originally by said Mortimer Livingston, as such Receiver, under the authority of an order of the Supreme Court, made on the 10th day of April, 1855, to recover the amount, with interest due by said defendants on the following promissory notes, made and given by them to the said General Mutual Insurance Company, viz.:

1	Note for	$560 00,	dated	Nov. 15, 1853,	due	Nov. 18, 1854.
2	" "	321 25,	"	Aug. 17, 1853,	"	Aug. 20, 1854.
3	" "	280 00,	"	Oct. 7, 1853,	"	Oct. 10, 1854.
4	" "	420 00,	"	Nov. 11, 1853,	"	Nov. 14, 1854.
5	" "	360 00,	"	Nov. 18, 1853,	"	Nov. 21, 1854.
6	" "	481 25,	"	Dec. 15, 1853,	"	Dec. 18, 1854.

"That the said defendants are indebted to the said Receiver in the sum of $2,422.50 for principal, together with interest thereon, from the dates on which they respectively became due as aforesaid.

"3d. That the said promissory notes were given for the premiums of insurance on certain policies made and executed to said defendants by the said General Mutual Insurance Company, That said policies, in the latter part of January, 1854, were canceled and surrendered before they expired, under an agreement to that effect indorsed on said policies, whereby the return premiums on said policies were to be paid to said defendants "rata-

bly out of the assets of the Company when divided," as by reference to said policies and the agreement indorsed thereon will more fully appear, and that said return premiums amount in the aggregate to the sum of $2,172.87, on which such sum the said defendants are entitled to a dividend, with other creditors, out of the assets of said Company. . . .

"4th. That the said defendants suffered a loss under the policy issued to them on the ship "Galena," amounting to $3,083.45, which loss was adjusted, and due and payable on the 9th day of January, 1854, and another loss on the policy on ship "Vicksburg," amounting to $2,253.45, adjusted on the 18th day of March, 1854, and another loss on the ship St. Louis, amounting to $56.40, adjusted on the 16th of February, 1854, which said losses amount in the aggregate to the sum of $5,393.30."

(On the trial, when the testimony was closed, and both parties had rested, "the defendants' counsel claimed that the said notes, which are the subject of this suit, passed into the hands of the Receiver, subject to the equitable right of the defendants to offset against, and to have applied to the discharge of the same the sum of $3,083.45, the adjusted loss due upon the 'Galena,' on the 9th day of January, 1854; and that inasmuch as such offset would exhaust the whole of the plaintiff's claim upon said notes, leaving a balance in favor of the defendants, the defendants were entitled to judgment against the plaintiff for such balance, together with their other claims against said Company, to be paid pro rata out of the assets of the Company.")

"The said Referee did further decide and determine as matters of law:

"1st. He overruled the claim made by defendants' counsel, that the said notes passed into the hands of the Receiver, subject to the equitable right of the defendants to offset against and to have applied to the discharge of the same the sum of $3,083.45, the adjusted loss due upon the 'Galena,' on the 9th day of January, 1854.

"2d. He further decided as matter of law, that the plaintiff was entitled to recover the full amount of the notes set forth in the complaint, and accordingly rendered judgment in favor of the plaintiff for the sum of $3,022.69, the amount of said note and interest.

"To which decision and judgment, and particularly so much thereof as decides that the defendants are not entitled to offset against the plaintiff's notes, the said adjusted loss on the ship 'Galena,' the defendants by their counsel duly excepted."

From the judgment entered upon the report of the referee, the defendants appealed to the General Term.

A. C. Morris, for appellants (the defendants).

I. The referee should have allowed the offset of the loss on the Galena.

The petition for the dissolution of the Company was filed March 10th, 1854.

The order for the dissolution of the Company and the appointment of a Receiver, was not made until September 9th, 1854.

Conceding that the order for the dissolution, &c., relates back to the time of filing the petition, still the Receiver's rights to the assets did not attach until March 10th, 1854.

The defendants' notes, none of which were due until several months afterward, passed into the hands of the Receiver with the other assets. At this time the Company was indebted to the defendants in the sum of $3,083.45, for the loss on the Galena, which was then due and payable.

Although the notes of the defendants were not due, they had an equitable right to anticipate their payment and have them offset against the loss on the Galena. (*Keep* v. *Lord*, 2 Duer, 78; *Hicks* v. *McGorty*, id., 298; *Lindsay* v. *Jackson*, 2 Paige, 581; *Receiver of Middle District Bank*, 1 id., 585; *Miller* v. *Receiver of Franklin Bank*, id., 444; *Holbrook* v. *Receiver of American Ins. Co.*, 6 id., 228; *Bradley* v. *Angel*, 3 Comst., 475.)

The Receiver took the notes subject to this equitable right. Under the authority of the above cases the defendants were entitled to an injunction at any time before the notes fell due to prevent their transfer to *bona fide* holders for value without notice. This is the only object of an injunction. Where the notes are not transferred, but suit is brought upon them by the original holder after they become due, the offset may be made under the statute.

In the present case the notes all fell due in the hands of the Receiver, and he is in no better position in regard to them than

the Company itself would have been if it had not become insolvent.

The statute defining the duties of receivers expressly recognizes the right of offset in cases like the present.

"Such receivers shall have all the power and authority conferred by law upon trustees to whom an assignment of the estate of the insolvent debtors may be made pursuant to the provision of the 5th chapter of the second part of the Revised Statutes." (2 R. S., 469, § 68.)

"The said trustees shall have power to sue in their own names, or otherwise, and recover all the estate, debts, and things in action belonging or due to such debtor, &c., &c., and no setoff shall be allowed in any such suit for any debt unless it was owing to such creditor by such debtor before the first publication of the notice required in the first article," &c. (2 R. S., 41, § 7,) and § 39 [36] p. 47, expressly allows a setoff of mutual debts by such Trustees.

II. There can be no reasonable objection to a judgment in favor of the defendants for the residue of their claims.

Claim for loss on Galena,	$3,083 45
Deduct notes,	2,422 50
Balance due defendants,	$660 95
Add loss on Vicksburg,	2,253 45
" " " St. Louis,	56 40
Return premiums,	2,172 87
	$5,143 67
Add difference of interest	

If the defendants take judgment against the Receiver for this balance, no prejudice can result to any person interested in the assets. A judgment against a Receiver merely adjusts the amount of the claim as against the insolvent corporation. In a suit against a Receiver it is not necessary for him to protect himself against a deficiency of assets by such pleas as executors, before the Revised Statutes, were compelled to interpose. As the executor under the present law is protected by the Surrogate, so is a Receiver by the Court that appoints him. The judgment merely

adjusts the amount due as between the party and the corporation. No execution can issue upon such a judgment against the Receiver personally, and a levy upon assets would undoubtedly result in punishment for contempt of Court.

III. Upon each of the policies upon which a return of premium is claimed is an indorsement as follows:

"It is agreed to return premium of .... allowed under this policy to be paid ratably out of the assets of the Company when divided. This policy is hereby canceled from ...., 1854."

By reference to the body of the policies it will be perceived that each policy contains a provision allowing the assured to cancel at his option. The indorsement is printed and appears to be a general form adopted by the Company to apprise its dealers, as they brought in their policies to be canceled, that the Company was going into liquidation and that it was paying out no money. How the Referee could have tortured this indorsement into an agreement by the defendants to allow "the amount of their notes to go to help to make up the fund from which they were to be paid their return premiums" is inconceivable.

IV. The Referee has entirely misconstrued the charter of the General Mutual Insurance Company. (See Charter, Laws 1841, 229; Amended, Laws 1842, 138.)

The notes sued upon are not subscription notes, but ordinary premium notes, the distinction between which has always been well understood by the Mutual Insurance Companies and their dealers. The distinction is shown in the admission of the plaintiff's counsel and is clearly pointed out in *Brouwer* v. *Hill*, (1 Sandf. S. C. R., 644,) also *Merchants Insurance Company* v. *Rey*, (id., 184.)

Alexander Hamilton, Jr., for respondent (the plaintiff).

I. The act incorporating the General Mutual Insurance Company, (Sess. Laws of 1841, 229, and Laws of 1842, 138,) established peculiar relations affecting the question.

Every insurer, a dealer with the Company, became a member or corporator interested in the premiums paid by all other dealers and corporators. (Sess. Laws of 1841, Chap. 252, §§ 6, 9.)

II. The earnings of the Company, being the premiums received from all the dealers, as well as the income derived from investment of premiums, were placed in a common stock or fund; and from this common fund the losses and expenses for the year were deducted, and out of the balance, if any, of profits, a dividend was declared to each dealer ratably according to the amount of earned premiums paid by him. (Sess. Laws of 1842, Chap. 132, § 1.)

Thus each dealer or insurer was not only a corporator, but interested in all the premiums paid by others, as well to pay his losses as to entitle him to profits.

The community of interest under this charter can be illustrated in this way:

A. B.'s earned premium amounts to $500.

The loss under his policy amounts to $500.

No profit has been made in the dealing with him.

From the yearly statement it appears the total amount of earned premiums was	$100,000
The total amount of losses and expenses was	50,000
Surplus of profits,	$50,000

Now, under the charter, A. B. is entitled to such a part of the $50,000 of profits as the earned premiums he paid bore to the whole amount of earned premiums; $500 being the $\frac{1}{200}$ part of $100,000, A. B. would be entitled to the $\frac{1}{200}$ part of $50,000, or a certificate of $250. He receives, in other words, a share of $250, in the aggregate profits to which he contributed nothing.

The dealers with the Company were in fact guarantors of each other, and in this consisted the "mutuality" of the plan.

It was a quasi-partnership.

III. To allow the setoff as claimed by the defendants, would be to pay his loss on the Galena in full to the extent of the amount of the notes offset against the loss, to the injury of the other creditors of the fund.

IV. To deduct the notes of solvent parties from their losses is to pay the claim in full "*pro tanto*," though the Company has passed into the hands of a Receiver, who can declare a dividend of forty per cent only; and to pay this dividend must look to these parties as contributing to the fund.

V. Among creditors equality is equity, and the statute relating to "voluntary dissolution" expressly provides for such equality among all the creditors. (2 R. S., 4 ed., 712.)

A fortiori, should such equality be established here, where the charter entitled every dealer to a participation in the premiums paid by all other dealers. (*Herckenrath* v. *Am. Mut. Ins. Co.*, 3 Barb. Ch. R., 63.)

VI. The Receiver is bound to collect in all the assets, and until they are collected it is not known whether any dividend will be made or not. The Receiver represents the rights and interests of all the other creditors, who are to be protected against every attempt to obtain an undue advantage or preference on the part of any one of them.

VII. The notes, in this case, so far as they were given for policies other than those upon which losses are claimed, are distinct and unconnected demands, and therefore come within the principle established by the Chancellor in 6 Paige, 232.

No case in the courts of this State present this question of equitable offset as depending upon the comparative equities of the general creditors and the particular creditor seeking the offset.

In Pennsylvania, however, this point has been expressly raised and decided. (*Hillier* v. *Alleghany Co. Mut. Co.*, 3 Barr., 470; *Long* v. *Mut. Ins. Co.*, 6 id., 421.)

I do not claim that the Receiver stands in any better position as against these defendants than the Company, if plaintiffs, and insolvent, would. If, being insolvent, the Company had been willing and had attempted to allow this setoff, the other creditors could have interfered and prevented.

The right and duty to refuse this setoff lie in the very constitution of the Company, and the resulting rights and obligations between the dealers.

The report of the Referee is correct, and the judgment entered thereon should be affirmed with costs.

BY THE COURT—PIERREPONT, J. The act incorporating the General Mutual Insurance Company provided that every person on obtaining a policy and paying the premium became a corporator interested in the premiums paid by all the other corporators; and in section 6 (Laws of 1841, p. 229), provides that "every per-

son who shall become a member of this corporation by effecting insurance therein, shall, the first time he effects insurance and before he receives his policy pay the rates that shall be fixed upon and decided by the trustees; and no premium so paid shall ever be withdrawn from said Company, but shall be liable to all losses and expenses incurred by this Company during the continuance of its charter."

Each dealer was therefore a corporator and interested in all the premiums paid by others. The earnings of the Company were the premiums paid in by all the dealers and the income derived from the investment of these premiums, which was all placed in a common fund, and after paying the annual losses and expenses, a dividend of the balance was declared to each dealer *pro rata*, according to the earned premiums paid by him.

It appears by a stipulation or admission found in the case, "that the General Mutual Insurance Company, in making the yearly estimate of net profits, under the provisions of their charter, credited each dealer with such proportion of the net, as the amount of earned premiums received from him was of the whole amount of earned premiums received by the Company during the year, without regard to the fact that the business of such dealer with the Company, for the year, had resulted in a loss to them; and further, that in making such estimate, the premiums and premium notes were in all cases placed and credited to the Company, as earnings, and the return premiums were placed with the losses and expenses, and deducted therefrom to ascertain the net profits for the year."

Under this charter, a dealer with this Company might receive a large annual profit though the Company made nothing by dealing with him: for example, the earned premium of A. is $1,000 and the loss under his policy is $1,000, the Company thus receive no more of A. than they pay him for his losses, and of course nothing is made by the dealing with him; but the total earned premiums for the year are $100,000 and the losses are but $10,000, leaving a surplus of $90,000 of profits. A. is entitled to such part of this $90,000 as the premium he paid bears to $100,000 —that is, A. receives $900 of these profits toward which he has contributed nothing; thus each dealer was interested in the earned premiums of every other dealer, and the corporators were

mutual guarantors of each other. In fact, a kind of partnership firm was formed, under an act of incorporation by which each member, being bound to pay his premium, was entitled to profits realized in proportion to his premium paid. Before the notes upon which this action is brought went into the Receiver's hands, the Company owed the defendants, for loss on the ship Galena, $3,083.45, which the defendants seek to offset. Ordinarily, if an insurance company holds a person's note, and at the same time owes the maker for a loss, an offset can be made, and the Receiver stands in no better position than the corporation whose assets he received. But the corporation, in this case, is not like an ordinary chartered company dealing with strangers; the peculiar relations of the corporators towards each other are voluntary, and the obligations are mutual, and it is entirely equitable that each should share losses when they happen in the same proportion as he was entitled to profits when made, and such is the fair interpretation of this contract. Each member must pay what he owes the corporation, and each will be entitled to his *pro rata* dividend of the assets. (*Hillier* v. *Alleghany Co. Mut. Ins. Co.*, 3 Barr., 470; *Long* v. *Mut. Ins. Co.*, 6 id., 421; *White* v. *Haight*, 16 N. Y., 310; *Bangs* v. *Gray*, 2 Kern., 477.)

The policies for which the notes were given were canceled by written agreement, and it was stipulated by the defendants that the return premiums were to be paid ratably out of the assets of the Company when divided, and we see no reason why the defendant should not be held to that agreement.

The judgment should be affirmed, with costs.

WOODRUFF, J. (Dissenting.) I regret that I am not able to concur in the decision made in this case, except as to the amount due to the defendants for return premiums.

It was conceded by the plaintiff's counsel that, in respect to the defendants' claim to setoff the amount of his loss by the ship Galena, (which was adjusted before the proceedings were taken by which the Insurance Company was adjudged insolvent,) the plaintiff, as Receiver, stood in the same situation as the Company itself would, had this action been prosecuted by them, (being in fact insolvent,) to recover the amount of the notes for which the action is brought. (2 R. S., 464, § 42; id., 469, §§ 68–

74; id., 41, § 7, and 47, § 39 [§ 36;] *Holbrook* v. *Receivers, &c.*, 6 Paige, 220; *Lindsay* v. *Jackson*, 2 id., 581.)

I cannot concur in the conclusion that the insolvency of the Company defeats the defendants' right to set off his claim for this loss, or that the defendants have to go into any calculation with the other corporators, in the nature of an accounting between copartners. If by making a set-off he gains any advantage over others having claims against the Company, so as to have his claim paid in full, he gains just what always happens when any other corporation, or an individual, becomes insolvent; those who are both debtors and creditors of the insolvent can make the setoff, while other creditors take such dividend as they can get.

The reasoning which is supposed to exclude this set-off will apply equally to all Mutual Insurance Companies, and embraces all who effect insurance with them upon the mutual plan. It is recognizing a new species of partnership heretofore not known in this State, and it involves this result. To-day a dealer sustains a loss, and the Company holding his notes to a corresponding amount, the right of set off is clear; to-morrow the Company becomes insolvent and the right of set off is gone; the note must be paid in full, and the dealer must take his chance of payment for his loss by awaiting the dividends which may be made of the assets of the Company.

In my judgment the Company in respect to its right to collect the note, and its obligation to pay the loss, is to be regarded as an artificial person to whom the same rules would apply as to an insolvent natural person.

Besides, if this idea of copartnership is to prevail, it is conceded that this peculiar result does not arise until insolvency happens, and if the reasoning is carried out to its legitimate result, it should follow that the rights of the parties should await the final accounting, and be then adjusted. It would then appear how much, and how much only, the defendants should be required to pay. Surely they ought not to be required to pay their notes in full when they are clearly entitled to something in return. The rule should be applied equally in favor of both parties, if applied for the benefit of one. The mutual accounting, if it is to be had, ought to embrace claims against the defendants as well as claims in their favor. To make the defendants pay their note in full,

and compel them to await the final accounting before their claim for a loss is paid, is to treat the parties as partners in respect to the Company's liability to them, and not as partners in respect to their liability to the Company.

I think the judgment should be reversed and a new trial ordered.

Judgment affirmed, with costs.[1]

JAMES BUNTEN, Plaintiff and Respondent, v. THE ORIENT MUTUAL INSURANCE COMPANY, Appellants.

1. Where, on the trial of a cause, the jury are instructed in respect to the rule of law which they are to apply, as requested by the defendants, and a verdict passes against them, and they move for a new trial on the ground that the verdict is contrary to evidence; the defendants have a right on such motion, for all the purposes of the motion itself, to insist that such instruction is correct.
2. If, on a fair application of the rule, as charged, the verdict is contrary to evidence, it will be set aside and a new trial be granted.
3. In such a case, it is erroneous to refuse a new trial, on the ground that the plaintiff has some equity disclosed by the evidence which entitles him to retain the verdict; especially when the pleadings neither intimate its nature or existence, nor an intention to assert and enforce it.
4. Where the question is whether an agent, (not having, by the papers which created him such agent and defined his powers, any authority to alter a policy which had been issued by his principal,) "was permitted to alter policies in respect to dates of sailing, from time to time, so that *that* became the customary usage and course of business;" the evidence must show, in order to bind the principal, at least several cases in which the agent, without asking the sanction of his acts by the principal, had made alterations of a like nature on which the principal had acted, and in which he had acquiesced when such alterations came to his knowledge; or it must tend to prove that although communicated by the agent they were acquiesced in, as acts which he was competent to perform, and as binding on his principal; or that he was held out to the public as authorized to do such acts.

(Before BOSWORTH, Ch. J.,, and SLOSSON and WOODRUFF, J. J.)

Heard, October 22d, 1858; decided, February 26, 1859.

[1] This judgment, on an appeal from it to the Court of Appeals, was affirmed.

THIS is an appeal by the defendants from an order made by Mr. Justice HOFFMAN, denying a motion for a new trial, made upon the ground that the verdict in favor of the plaintiff was against the weight of evidence.

The main facts from which the controversy arises are as follows:

The defendants, a Marine Insurance Company in New York, employed McLimont as their agent in Quebec, under a letter of authority dated December 14th, 1854.

The agent, McLimont, did not issue policies to parties; they were always issued by the Company, in New York, upon his returns of risks agreed to by him.

The plaintiff, in the first week of October, 1855, made an application in writing to McLimont for insurance on the cargo of the Azoff, to which he agreed, and the material parts of which were transmitted by him, on the 16th of October, to the Company.

The plaintiff's agent testified that he then stated to McLimont that the ship would be likely to get away by the 10th, but that he was not certain to a day; that McLimont agreed to the insurance, the ship to sail at any time before November, and that the premium would be charged according to the standard. And that on the 11th of October he instructed McLimont to have the policy specify the 15th of October as the day of sailing.

On 20th October 1855, a policy in accordance with the "return" of the risk was forwarded to the agent of the Company.

The policy was received by the agent on the 23d or 24th of October, and sent by him to plaintiff; the same day the policy was received, the latter called upon the agent, requesting him to alter the date of sailing, which the agent did, by changing that date from the 10th to the 15th of October, 1855.

The policy, as issued, contained a warranty that the vessel should sail on the 10th of October. This warranty was changed to the 15th of October, in the manner above stated. The defendants insist that it was so changed without their sanction or knowledge. The vessel did not sail until after the 10th of October.

The extension beyond the 10th of October, required an additional premium of one per cent, and this was known to the plaintiff.

No alteration was made in the premium in the policy, which remained at three per cent.

The cargo insured was totally lost October 29th, 1855. The defendants refused to receive any premium on this risk, when the returns of premiums received by the agent were made by him to them in the fall of 1855, after the loss was known.

It appeared that John Dean, one of and in behalf of the firm of Dean & Co., applied in New York to the defendants, on the 21st of September, 1855, for a policy on the hull of the Azoff. A policy was then agreed to be issued for $5,000 on her hull, and the day of her sailing was left in blank on the margin of the application, to be filled when that fact was ascertained, and the premium to be paid was to be according to the risk, as affected by the time of sailing, in accordance with the established rates of the Company. The insurance was to be void unless the vessel sailed before the 10th of November. Mr. Dean testified, that "on the 21st of October, I think, and certainly before the 24th, I called upon Mr. Ogden (the Vice-President), and told him that the vessel went to sea on the 15th, and I think he marked it on the application, and the policy was then made out and delivered."

It appeared that Charles Irving, the Secretary of the Company, conducted the correspondence with McLimont, the agent, in respect to issuing the policy on the risk taken by him, and did not know that Mr. Dean had told any officer of the Company on what day the vessel sailed.

Some details of evidence are stated in the opinion of the Court, delivered at General Term.

The action was tried before Mr. Justice WOODRUFF and a jury, on the 21st of January, 1858. He charged the jury as follows:

"I do not understand that there is any controversy between the counsel for these parties as to rules of law. It is true that a material alteration, without the sanction of the Company or their agent, avoids it; and if it was altered without authority, then the defendants are not bound by the policy; and I charge you now, as a matter of law, that an alteration of the date of sailing in this policy, was a material alteration.

"The inquiry, then, is, whether this Company or their authorized agent did insure this plaintiff under the policy as altered. It appears, by the deposition of McLimont, that on the 14th of

December, 1854, the defendants gave to McLimont their letter of authority to act for them in Quebec.

"It further appears that he acted under this letter. In this condition of things, it seems that the Company complained that he exceeded his instructions, and this led to the letter of the 22d February, 1855.

"If the case stood upon that alone, it would be a restriction of the original authority; but McLimont states that he came to New York, and that this restriction was withdrawn. The Vice-President says that this last letter was not withdrawn; McLimont says that it was revoked; but McLimont goes further, and says that the revocation was made clear by the letter of the 7th of July, 1855. Under the letters and instructions produced, the agent, McLimont, had authority to bind the defendants by a contract to insure in October, 1855. The tariff of rates was submitted to Bunten. He testifies that he then expected the vessel would sail on the 10th, but could not tell on what precise day she would be ready. McLimont does not, I think, negative the idea that Bunten told him this. Now if the agent had authority, before the 10th day of October, to bind the defendants, by an agreement to insure, with a warranty to sail on the 10th, then he had authority to bind them by such an agreement on the 11th, with a warranty to sail on the 15th; and had the plaintiff come here relying on a contract of that kind, the Court would have held them, and, if necessary, would have required them to execute a policy in conformity with such a contract. But the plaintiff comes here with another case. His complaint is upon the policy itself as altered. It appears that the agent altered the policy which the Company issued, by changing the date of sailing. The plaintiff therefore claims that the agent had authority to make such alteration. In my view, the plaintiff's right to recover depends upon the question whether the agent had authority to alter this written instrument. The plaintiff does not claim that the agent had originally an authority to make a policy, or to alter policies, which the Company issued. The question, then, depends on this, whether McLimont was permitted to alter policies in respect to dates of sailing, from time to time, and the Company sanctioned it, so that that became the customary usage and course of business. If that be so, then he is to be deemed

to have authority to make the alteration in this instance. The plaintiff or his agent had a right to act upon the presumption of authority, if such had been the course of business, under the sanction of the Company. McLimont states that he did alter policies in that very particular, and that the Company sanctioned it. The Secretary mentions that some alterations were reported to the Company and sanctioned. There is nothing to suggest a doubt that if Mr. Bunten had gone to the Company on the 11th of October, and asked an extension, they would have granted it. Now it depends on the construction of the language of the witnesses, Ogden and Irving, and you must decide between McLimont and them; and this case, as before remarked, turns upon the question whether McLimont had authority to make the alteration."

The jury brought in a verdict for the plaintiff for $4,961.92.

The defendants moved for a new trial, which was denied. The following opinion was delivered in support of that decision:

Hoffman, J. Upon the evidence in the case, there are certain important points made out tending to support the verdict upon principles of equity merely.

The agent of the plaintiff met McLimont, the agent of the defendants, on the 11th day of October, and told him the vessel was in the river, and he ought to fix the time of sailing as of the 15th day of October. The warranty was to sail on the 10th, application having been made the end of September or beginning of October.

McLimont did not transmit the materials of the application to make the policy from Quebec to New York, until the 16th day of October.

On the 20th day of October, the policy was sent from New York and received about the 23d. It was sent shortly after to the plaintiff's agent. He noticed the warranty as being of the 10th day of October, and immediately took it to the defendants' agent, who made the alteration to the 15th.

On the 21st day of October, probably, certainly before the 24th, the Company in New York had notice that the vessel had not sailed till the 15th. that date being filled up in the vessel's policy.

It is true, that one of the officers of the Company made out the policy and forwarded it; another got the information as to the time of sailing. But nothing could be more dangerous than to act upon a rule which would make any such distinction, which would not make the Company responsible for the knowledge of every officer within whose province it was to deal with the particular matter.

The loss took place about the 29th day of October, at sea.

The learned Judge, on the trial, intimates an opinion that the defendants could have been compelled to execute a policy with the alteration to the 15th, had there been a contract on the 11th, with a warranty to sail on the 15th. But the case turned, he thought, upon the question whether the agent had authority to make the alteration of the written instrument. That question he left to the jury upon the evidence as to a custom for the agent to make, and the Company to ratify such an alteration. It is contended that the jury found in support of such a custom without a shadow of evidence, indeed, explicitly against it.

If the decision of the motion for a new trial rested upon this question, I should feel very great doubt whether the verdict could be sustained. But justice has, in my opinion, been done, and upon the case as fully disclosed by the whole evidence, I cannot but think that an amendment of the pleading might have been allowed to the effect, that the Company with knowledge of the actual time of sailing of the vessel authorized or permitted the delivery of the policy. On such a case made, it strikes me the verdict would be both just and conformable to the pleadings.

I understand that on such a motion as the present, on a case, the Court may be governed by such considerations.

Motion denied, without costs.

From the order denying the motion for a new trial, the defendants appealed to the General Term.

Alexander Hamilton, Jr., for appellants.

The plaintiff was bound to prove, and the jury must have found as a fact, under the ruling of the Court, that policies, before the transaction in question, were altered by the agent in respect to dates of sailing, with the knowledge of the Company, "as a customary usage and course of business." It was not sufficient

that in certain cases alterations were sanctioned, and in others rejected; such a state of things could not establish a "customary usage," nor justify the presumption of authority to be derived from it. Such a course of business must, of course, have preceded the transaction in question.

The contract was avoided when the policy was altered between the agent and the plaintiff, as both then knew the vessel had sailed on the 15th and not on the 10th.

A man of ordinary prudence, would and should have required some evidence of the agent's authority. Nothing of the kind was done.

In regard to the equitable grounds upon which the new trial was denied by the Special Term, it is to be remembered that the defendants did not come prepared upon any such point; the sole issue presented by the pleadings being whether the alteration of the policy was valid and authorized or not.

It was a surprise upon the counsel and party, and was introduced at the close of the trial.

William Stanley, for respondent, contended, *inter alia*, that,

I. The circumstances under which the alteration in the day of sailing was made, show perfect good faith on the part of the plaintiff, and on the part of Mr. McLimont, the defendants' agent, and no fraud of any kind on the part of either plaintiff or defendants' agent is pretended. The defense is technical and inequitable.

II. McLimont was authorized to make the alteration in the policy.

His written instructions were a sufficient authority for the purpose. (See letter of 14th Dec., 1854.)

It is clear that this letter authorized McLimont to enter into a binding contract, on behalf of the defendants, to insure the plaintiff's cargo upon the terms and conditions stated in the policy, as altered. When the contract was thus completed, the filling out and execution of the policy was a mere form; it did not change in any respect the rights or obligations of either of the parties. In the absence, then, of an express restriction, it would be absurd to say that an agent, who had full authority to settle all the terms and conditions upon which the policy should be made out, was not authorized to make the slightest alteration in the policy itself.

The contract made by the agent would have been complete and binding, though no policy had ever been issued. (*Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. U. S. R., 405; *Perkins* v. *Washington Ins Co.*, 4 Cow., 645; *McCulloch* v. *The Eagle Ins. Co.*, 1 Pick., 280, per PARKER, Ch. J.)

III. The policy being valid as originally drawn, notwithstanding the alteration, there was evidence in the case from which the defendants will be held to have waived the condition as to the vessel's sailing on the 10th.

1. The acts of the officers of the Company at New York were evidence of such waiver. (See last page of opinion of HOFFMAN, J.)

2. There was a clear waiver by the agent, McLimont; and he had sufficient authority for that purpose.

IV. The verdict can be sustained without the aid of the policy, upon the original contract to insure, made by McLimont with the plaintiff, on the 11th of October.

The learned Judge, in his charge, says: "If the agent had authority, before the 10th day of October, to bind the defendants by an agreement to insure, with a warranty to sail on the 10th, then he had authority to bind them by such an agreement on the 11th, with a warranty to sail on the 15th. And had the plaintiff come here relying on a contract of that kind, the Court would have held them, and if necessary, would have required them to execute a policy in conformity with such a contract. But the plaintiff comes here with another case. This complaint is upon the policy itself, as altered."

The learned Judge erred in saying that the plaintiff came with another case. There was no difference in substance between the original contract made by the agent, and the contract evidenced by the policy. The latter was only a more formal expression of the former.

If the complaint was not sufficient as it stood, the Judge should have ordered it to be amended so as to conform to the facts proved. (Code, § 173.) And this court will now order it to be so amended, or will treat it as having been amended. (*Bowdoin* v. *Coleman*, 3 Abb., 431; *Bate* v. *Graham*, 1 Kern., 242.)

BY THE COURT—BOSWORTH, Ch. J. The Judge, before whom this action was tried, instructed the jury, *inter alia*, that the

plaintiff's "complaint is upon the policy, as altered. That the plaintiff's right to recover depends upon the question whether the agent had authority to alter this written instrument. The plaintiff does not claim that the agent had, originally, any authority * * * to alter policies which the Company issued. The question, then, depends on this, whether McLimont was permitted to alter policies in respect to dates of sailing, from time to time, and the Company sanctioned it, so that that became the customary usage and course of business."

"This case, as before stated, turns upon the question, whether McLimont had authority to make the alteration."

If the evidence given does not justify the inference, or conclusion that "McLimont was permitted to alter policies, in respect to dates of sailing, from time to time, and the Company sanctioned it, so that that became the customary usage and course of business," the verdict should be set aside and a new trial granted. The rights of suitors cannot be protected, unless the party against whom a verdict has been rendered, can, on a motion to set it aside as contrary to law and evidence, be secured a just and firm application of the rule which, at the trial, he insists the jury should be instructed to apply, and which, in conformity to what he claims to be the law, they are instructed to apply to the facts they may find.

If, on a fair application of the law, which the jury were instructed to obey, he was entitled to a verdict, the verdict, if against him, should be set aside. If the law, as he insisted it should be stated in the charge of the Judge to the jury, had been stated differently, it would have been his right to except to the ruling, and if erroneous, his exception would secure to him a new trial.

Assuming it to be true that the instructions given were proper, and such as the defendants, on the trial of this action had a right to demand, and that, under the instructions given, the verdict of the jury should have been in their favor, and the verdict rendered against them is clearly against evidence, yet if a new trial be refused, on the idea that the plaintiff has some equity superior to the defendants' clear legal right, they are remediless. An appeal to the Court of Appeals can be of no service. The jury were correctly instructed as to the law, and that Court will not inquire whether there was any evidence to warrant the verdict.

If it be supposed that the plaintiff ought to recover on some equitable grounds, notwithstanding the right of the defendants to a verdict in this action, on the pleadings, as they stand, and on the evidence given at the trial, which has been had, and assuming the law to be, as the Judge in his charge instructed the jury it was, the defendants should at least have a chance to litigate this supposed equitable right in some action in which it is asserted prior to the trial, and upon pleadings which at least intimate the existence and nature of the supposed equitable right, and an intention to assert and enforce it.

We think, therefore, that unless the evidence warranted a verdict in favor of the plaintiff, upon the only question submitted to the jury, a question on the proper determination of which, as they were instructed, the right of the plaintiff to recover alone depended, the verdict should be set aside and a new trial granted.

That the policy had been altered, after it had been issued by the defendants and delivered to the plaintiff, and that it had been so altered without any authority from the Company, and without their consent, and without any knowledge thereof on their part until a claim for a loss was presented under such policy, was set up in their answer, as a defense, and such allegations were at issue upon the pleadings.

The letter of the 14th of December, 1854, authorized the agent to take risks upon "cargoes of lumber (from) Quebec to Great Britain and Continent of Europe," at a "tariff of rates" which he had presented to the Company and which the latter had approved. The letter of the 7th of July, 1855, in clear terms denies to him the power to take other risks. Those rates, on vessels or cargoes sailing before the 10th of October were 3 per cent, and after the 10th and on or before the 15th were 3½ per cent, and on and after the 15th and before the 25th, 4 per cent. So the agent testifies. The Secretary of the Company testifies that it was 4 per cent after the 10th until the 20th.

The policy in question, in and by which, as originally issued, the vessel was warranted to sail on the 10th of October, 1855, states the sum insured to be $4,510, the premium $135.30, and the policy $1.25, or, in other words, insures at the rate of 3 per cent.

By the contract as altered, the vessel was warranted to sail on the 15th, and might and did sail after the 10th. And by its terms, as thus altered, the Company took the risk and agreed to be responsible for the losses against which it insured, at 3 per cent. The written authority of the agent, by its terms, declares that, "on all risks and amounts on risks, other than the amounts and risks which you are therein, (viz.: in the letter of December 14, 1854,) authorized to take, you are not empowered to bind us, but they must first be submitted to us for our approval and sanction."

His written authority, it is quite clear, did not authorize him to make such a contract, as the written policy, as altered by him, is, at the rate of premium therein expressed.

Was he allowed to make such alterations in policies that had been issued by the Company, and did the Company, knowing that he had done so, acquiesce in such acts, so that that became the customary usage and course of business?

The agent swears that he was, and specifies as instances the ship Eleanor, from Quebec to Great Britain; the ship Tchernaya, and the ship Caledonia, from Ristigouch to Great Britain.

The alterations made in the policies of those three vessels were communicated by the agent to the Company. In the case of the Eleanor, the day of sailing was altered and an additional premium charged, and the Company sanctioned it.

In the case of the Tchernaya, the policy, as issued, was on the vessel, and included launching. In the case of the Caledonia, the time to sail was enlarged twenty-four hours.

There is no proof of a single case where such an alteration was made, and there was a subsequent loss, followed by payment by the Company of the sum insured, without the fact of such alteration having been made, being previously communicated to the Company and approved by them.

The evidence shows that the Company frequently assumed to decline risks which he had taken or proposed to take; as withholding a policy on the Caledonia, until informed that she sailed before the 10th of August, 1855, unless an increased premium was paid. So in reducing the amount insured on Wm. McLimont's policy, and increasing the rate (September 12, 1855); so in declining an alteration in the policy of the "Northern Belle,"

(August 3, 1855,) so in declining a risk on the "Raritan," (October 6, 1855,) so in "declining the Splendid and refusing to sanction extension of Lucien," by letter of the 19th of November, 1855, a date prior to the time when the defendants are shown to have had notice or reason to suspect that the policy in question had been altered.

The officers of the Insurance Company deny, in their testimony, that the agent was ever allowed to alter policies so as to bind the Company, without their sanction of the act, or that any case occurred in which he altered the time of sailing specified in a policy after it was issued, and that they acquiesced in it, or paid a loss under it, when the fact of such alteration had not been previously communicated and expressly approved.

The policy in question is the first policy which the insured is proved to have effected with this Company. His son, who applied for it in his behalf to the agent, had no previous acquaintance with him, and had never seen him until he made such application.

The applicant did not, therefore, rely upon the sanction by the defendants of previous similar acts of the agent, in respect to policies issued by them to the insured, in asking the alteration and in relying upon the altered policy as an authorized contract of the defendants.

To justify a jury in finding the affirmative of the question which was submitted to them as the turning point in the controversy, the evidence should show, if not a succession, at least several cases, in which the agent, without asking the sanction of his acts by the Company, had made alterations of a like nature, on which the Company had acted and in which they had acquiesced when such alterations came to their knowledge without having been previously communicated by the agent, or the evidence should be such as would tend to prove that, although communicated by the agent, they were acquiesced in as acts, which he was competent to perform, and as binding on the Company.

Evidence short of this cannot justify the conclusion that the agent did alter policies, from time to time, with the sanction of the Company, so that the exercise of such authority by him "became the customary usage and course of business."

And we think it may be safely affirmed that the agent, in no instance prior to this, was permitted to alter, or to the knowledge

of the Company had altered a policy that had been issued by the Company to the insured, so that it became in terms a contract which, originally, he had no power to make. If, as altered, the risk was increased, and by the rules of the Company entitled them to a larger premium than that for which, by the policy, they agreed to be liable, there should at least be some evidence that such an alteration had been sanctioned either expressly by the Company, or by their acquiescence in it.

This action is brought upon the policy, as being, as it now reads, a valid contract of the Company. The agent never had authority to make such a contract, and clearly he had no authority to alter a written contract of the Company and convert it into a contract which he had no power to make, if none had been executed by the Company.

A new trial should be granted, with costs to abide the event.

Ordered accordingly.

ETIENNE DE PIERRES and wife, Plaintiffs and Respondents, *v.* HERMAN THORN and wife, Defendants and Appellants.

On the 4th of June, 1842, at Paris, in France, Etienne De Pierres and Jane Thorn, the daughter of the defendants, in contemplation of a marriage then about to be solemnized between them, entered into a written contract signed by them and by the defendants, as the parties thereto. The defendants and their daughter, Jane Thorn, were citizens of New York, but were actually residing in Paris, and E. De Pierres was a citizen of France. The contract was executed according to the laws of France, and by such laws was valid. By the 6th Article of said contract, the defendants, "in consideration of the projected marriage," "give and constitute in dowry, by advancement on their estate on their demise, to the future wife, who accepts," the sum of 400,000 francs, or $74,211, which they bind themselves jointly and severally to be paid to the future husband and wife, by their estates, one month after the decease of the survivor of them, the donors, but without interest thereon till that epoch." The payment was to be made in New York.

After providing for the contingency of the death of Jane Thorn, without issue, before the defendants, or of the death of her children before her, and in that event reserving to themselves "the right of the retraction" therein specified, that article has these clauses, viz.:

"For the security and guaranty of the payment of the said sum of four hundred thousand francs, or seventy-four thousand two hundred and eleven dollars, in principal and interest, Mr. and Madame Thorn charge, bind and mortgage, specially, with full solidarity between them.

"The estate already above indicated, called *Elmwood*, situate near the city of New York in the village of Bloomingdale.

"Mr. and Madame Thorn are the owners of said real estate, having come to them by inheritance, as they do hereby declare, and they bind themselves to prove title thereto regularly within a delay of six months. * *

"A mortgage shall be registered in favor of the future wife, against Mr. and Madame Thorn, her father and mother; according to express contract mentioned, there will have to be made in said mortgage a reservation of the right of retraction stipulated in favor of Mr. and Madame Thorn."

Immediately after the execution of said contract, and relying upon its performance, E. De Pierres and Jane Thorn were married in Paris, and have since resided in France.

The defendants continued to reside in Paris until about the 29th of Sept., 1845, on which day they returned to, and have since resided in, New York.

The defendant, Herman Thorn, on the 12th of April, 1855, was required to execute, together with his wife, a mortgage of Elmwood, to the plaintiffs, to secure the payment of the $74,211, according to said 6th Article.

Offers were made by him to secure the payment of that sum in modes suggested by him, and negotiations in that behalf were continued until they were terminated by the plaintiffs' refusal to accede to the offers made.

This action was commenced on the 29th of October, 1855.

1. *Held*, that the plaintiffs were entitled to a judgment compelling the defendants to execute to them a mortgage of Elmwood, to secure the payment of the $74,211 at the time and in the manner and according to the stipulations in that behalf contained in said 6th Article.
2. That the action was not barred by the statute of limitations.
3. That the mortgage contract was an equitable mortgage of the property called Elmwood, and was a conveyance thereof, as defined by section 38 of 1 Revised Statutes, 762, and that the execution thereof by Mrs. Thorn, (she being at that time a non-resident,) could, under section 11, 1 Revised Statutes, 758, be proved as if she were *sole*, and that such conveyance as to her had the same effect as if she were *sole*.
4. It appearing that after the execution of said contract, and before the commencement of this suit, the defendants had mortgaged Elmwood to secure $70,000, by a mortgage recorded and in full force, it was also held that the further judgment that Herman Thorn should remove the lien of said mortgage within six months after service of a copy of the judgment, was equitable and just.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, December 13, 1858; decided, February 26, 1859.

THIS is an appeal by the defendants from a judgment entered on the decision of Mr. Justice BOSWORTH, made upon the trial of the action before him without a jury. It was tried in May, 1857.

The action was commenced by the service of a summons and complaint, on the 29th of October, 1855. It is brought by Etienne De Pierres and Jane Thorn De Pierres (husband and wife) against Herman Thorn and Jane Mary Thorn his wife, to compel the defendants to perform specifically, clauses of contract on their part contained in a written contract entered into on the 4th of June, 1842, in Paris, (in France,) in contemplation of the marriage then about to be solemnized there between the plaintiffs, Jane Thorn De Pierres being the daughter of the defendants. Etienne De Pierres, is the party of the first part to such contract; the said Jane Thorn is the party of the second part to it, and the defendants are also parties. The portion of the agreement preceding the 5th Article, consists of a description of the parties to it, their domicil and actual residence; a statement of the names of the distinguished individuals present at the execution of the agreement and who signed it as witnesses (the list of which covers over two printed pages); of a declaration of the intended husband and wife "that they intend marrying under the Regime of Community, such as the Code Civil of France establishes, with the exception, however, of the modifications which are hereinafter expressed" (this declaration being the 1st Article); of a description of the class of "debts or hypothecations" chargeable upon each of them in severalty (this being the 2d Article); the items and amounts of property which Etienne De Pierres "brings in and personally constitutes as dowry" (this being the 3d Article); and the items and amount of property which "Mademoiselle Thorn, the future wife, brings into the marriage and constitutes personally in dowry," (this being the 4th Article.)

The merits of the controversy mainly depend upon the true meaning and effect of the 6th Article. A copy of the entire agreement in the French language is contained in the case; and also a translation of it made by Christian G. Eckel, a witness on the part of the plaintiffs, and also a translation of it made by Frederick R. Coudert, a witness on the part of the defendants.

The 5th Article and the 6th Article, as translated by Eckel, read thus, viz.:

"Article Fifth. The intended husband binds himself to remit every year to his said future wife, the sum of five thousand francs, which sum is to be paid her from three to three months, destined for the entertainment of the future wife, and her personal expenses, as also to the payment of the wages of her chambermaid, so that she shall need give no account whatever therefor.

"Article Sixth. In consideration of the projected marriage, Mr. and Madame Thorn, father and mother of Mademoiselle the future wife, give and constitute in dowry, by advancement on their estate on their demise,

"To the said future wife who accepts,

"The principal sum of four hundred thousand francs, representing in money of the United States, the sum of seventy-four thousand two hundred and eleven dollars, at the ratio of five francs thirty-nine centimes the dollar, which they bind themselves jointly and severally to cause to be paid to the future husband and wife, by their estates, one month after the decease of the survivor of them, the donors, but without interest thereon until that epoch.

"The payment of the said sum of four hundred thousand francs is to be made in New York in money of the United States, and according to the rates of the day.

"To count from the day of the demise of the survivor of Mr. and Madame Thorn, donors, the sum of four hundred thousand francs will produce interest at the rate of five per cent per annum of full right, and so that it shall be unnecessary to make demand thereof.

"Mr. and Madame Thorn, the donors, expressly reserve to themselves the right of the retraction of said principal sum of four hundred thousand francs in case that Mademoiselle, the future wife, should happen to die before them without leaving children, and even in the case that such *children should die before her* without nevertheless, that this right of retraction shall do any harm to the effect of the donation of a moiety *in usufruct* for life, which the future husband and wife are to make to one another by the execution of these presents.

"For the security and guaranty of the payment of the said sum of four hundred thousand francs, or seventy-four thousand and two hundred and eleven dollars in principal and interest,

Mr. and Madame Thorn charge, bind and mortgage specially with full solidarity between them—

"The estate already above indicated, called Elmwood, situate near the city of New York, in the village of Bloomingdale.

"Mr. and Madame Thorn are the owners of said real estate, having come to them by inheritance as they do hereby declare, and they bind themselves to prove title thereto regularly within a delay of six months.

"They declare that the said estate is of a value of about two hundred thousand dollars, making in France the sum of more than one million of francs, and that the same is only mortgaged to an amount of twenty-four thousand dollars or one hundred and twenty-nine thousand three hundred and sixty francs, about which they owe to said demoiselle, their daughter, the future wife, as has been stated here above.

"A mortgage shall be registered in favor of the future wife against Mr. and Madame Thorn, her father and mother; according to express contract mentioned, there will have to be made in said mortgage a reservation of the right of retraction stipulated in favor of Mr. and Madame Thorn."

The 6th Article, as translated by Coudert, reads thus, viz.:

"ARTICLE 6th. In consideration of the contemplated marriage, Mr. and Mrs. Thorn, father and mother of the future bride, constitute and give as her marriage portion by way of advance on the estate which they will leave on their demise to the said future wife, who accepts, the principal sum of four hundred thousand francs, making in money of the United States the sum of seventy-four thousand two hundred and eleven dollars, at the rate of five francs thirty-nine centimes to the dollar, which they bind themselves jointly and severally to cause to be paid to the future couple by their estates one year after the decease of the survivor of them, the donors, and without interest until that epoch.

"Payment of said sum of four hundred thousand francs shall be made at New York, in money of the United States and according to the rate exchange at that day. From the day of the decease of the survivor of Mr. and Mrs. Thorn, donors, the said sum of four hundred thousand francs shall bear interest, as a matter of right and without any demand being necessary, at the rate of five per cent per annum.

"Mr. and Mrs. Thorn, donors, expressly reserve to themselves the reversion of the said principal sum of four hundred thousand francs in case Miss Thorn, the future wife, should die before them without issue, and even in case said issue should die before them, said reversionary right, however, is not to prejudice the effect of the donation of a moiety *in usufruct*, which the future couple are to make to each other by these presents.

"As security and guaranty for the payment of the said sum of four hundred thousand francs or seventy-four thousand two hundred and eleven dollars principal and interest, Mr. and Mrs. Thorn charge, bind and mortgage specially with full solidarity between them the property already mentioned above, called Elmwood, situated near New York in the village of Bloomingdale.

"Mr. and Mrs. Thorn are the owners of the said property by inheritance, and as such they declare it to be, and bind themselves within six months regularly to prove their title thereto.

"They declare that the said property is of the value of about two hundred thousand dollars, making in France over one million francs, and that it is mortgaged for twenty-four thousand dollars or one hundred and twenty-nine thousand three hundred and sixty francs or thereabouts, due to the future bride, their daughter, as already mentioned above.

"There shall be made an entry of record for the benefit of the future wife, against Mr. and Mrs. Thorn, her father and mother, and by express agreement there shall be made mention, in said entry, of the reversionary right stipulated in favor of Mr. and Mrs. Thorn."

This suit is brought to compel the defendants, and the complaint prays for a judgment compelling them to execute and deliver to the plaintiffs a mortgage of the real estate called "Elmwood," to secure the payment of the moneys stipulated by said 6th Article, to be paid, and as therein agreed to be paid.

The answer is, in substance, a general denial of the allegations of the complaint; and avers that the alleged agreement is not obligatory by reason of not being so executed as to satisfy the New York statute of frauds.

It sets up as a separate defense, that none of the alleged causes of action accrued within ten years next before the commencement of this suit.

Ferdinand Armand Landon, formerly a Notary Public in Paris, (who was examined under a commission,) testified, that he drew up the marriage contract in question, read the same to the parties, and received their signatures to it; that it was signed in the abode of Mr. Thorn, in Paris, on the day mentioned in the contract; that he was present at the execution of the contract in his capacity as Notary Public; that he acted in the capacity of Notary, appointed by the King, according to the French laws; that his name was inscribed at the head of the said contract or agreement, and he signed the same in his capacity of Notary; that he remained the keeper of the said contract, according to the French laws; that his successor Mr. Descours now holds the same; the deposit is permanent, and such a contract or agreement must remain in the custody of his successor or that of any other who may succeed him in the office; the original contract cannot be removed or sent abroad; that Mr. and Mrs. Thorn, and Mr. and Mrs. De Pierres signed the contract in his presence; the persons who signed as witnesses, not being the parties bound by the contract, their signatures being only honorary, and he could not affirm that they all signed in his presence. "The copy exhibited to me is signed by the Notary holding the original minute, and is equally valid as the minute itself." The original is called the "minute."

That he was required by law to keep and did keep a book or register called "Repertoire," in which was entered on the day when the contract was executed and signed, an entry stating its nature, its date, the names of the parties, their business and residence. The whole of it is not copied into the "Repertoire."

It was proved that the copy (in French) produced on the trial was a true copy of the original contract.

A correspondence between A. Mann, Jr., on behalf of the plaintiffs, and John B. Stevens, as attorney of Herman Thorn, was read in evidence, some portions of which are recited in the following opinion, delivered at Special Term.

Mr. Stevens, in his letter to Mr. Mann of the 7th of June, 1855, says: "There is now upon the property (Elmwood) a mortgage of seventy thousand dollars to the New York Life Insurance and Trust Company."

An abstract of the title to Elmwood, and of the incumbrances thereon, made by Lucius Robinson as Referee, on the 18th of June, 1853, was read in evidence by consent, which abstract states that there were "no general liens by judgments or decree, nor *lis pendens*," but states that there was an "indemnity mortgage," recorded June 7th, 1833, of $72,222.22, "payable on or before the death of Mary Thorn," and mentions no other particulars respecting it.

When the plaintiffs rested their case, the defendants' counsel moved to dismiss the complaint as to Jane Mary Thorn, and also as to Herman Thorn, among other grounds—

As to Jane Mary Thorn, that she was incompetent to enter into the marriage contract.

As to both defendants, that there is no evidence of the alleged contract.

That there never was a tender of any mortgage, or conveyance in the nature thereof, to either of the defendants with request to execute the same.

That the alleged contract, as respects real estate, is void under the statute of frauds.

That as the alleged contract is dated in June, 1842, and as the defendants arrived in this country on the 29th of September, 1845, and have ever since here resided, which facts were admitted by plaintiffs' counsel, and as this suit was not commenced until October 29th, 1855, the plaintiffs could not maintain this action.

The motion was denied by the Court; to which decision and ruling the defendants then and there duly excepted.

The facts found by the Judge, and his conclusions of law, are as follows, viz.:

"On the 4th of June, 1842, at the city of Paris, in France, an agreement in writing, and written in the French language, was entered into before Ferdinand Armand Landon and Pierre Charles Matthieu Piet, Notaries, a copy of which, translated into the English language by Christian G. Eckel, is hereinbefore set forth, and is substantially a correct translation and copy of said marriage contract.

"At the time of entering into said agreement, the plaintiff, Etienne De Pierres, was a citizen of and resident in France, and

unmarried. The plaintiff, Jane Thorn, was at that time residing in France, and was unmarried, and is a daughter of the defendants, Herman Thorn and Jane Mary Thorn his wife; both defendants also at that time resided in Paris aforesaid.

"The said agreement in writing was signed by both of the said defendants on the said 4th of June, 1852, in Paris aforesaid, before the said notaries, and was executed in conformity with the laws of France.

"The plaintiffs, Etienne De Pierres and Jane Thorn, subsequently and on the 6th of June, 1842, intermarried, and their marriage was solemnized in Paris aforesaid, and such marriage was solemnized in consequence of said marriage contract, and in reliance by the plaintiffs that the defendants would do and perform all things which in and thereby they had agreed to perform.

"The property described in the said agreement as Elmwood, is correctly described in the complaint in this action.

"The defendants continued to reside in Paris aforesaid, until about the 29th of September, 1845, on which day they arrived in the State of New York, where they have since continued to reside.

"On the 12th of April, 1855, a letter was sent to the defendant, Herman Thorn, by Mr. A. Mann, in behalf of and by authority of the plaintiffs, requiring the defendants to execute to the plaintiffs a mortgage of Elmwood, to secure the payment of $74,211, according to the terms and conditions of the said marriage contract. In answer to such request, the defendant, Herman Thorn, through his authorized agent, M. J. B. Stevens, proposed to convey the said property to a trustee in trust, and upon the trusts, among others, to sell such property, and pay to the said plaintiffs such sums as should become payable to them under the said marriage contract, and when the same, according to the terms of said marriage contract, should become payable.

"Negotiations on this point were continued between Mr. Mann, on behalf of the plaintiffs, and Mr. Stevens, on behalf of Mr. Herman Thorn, which terminated in Mr. Mann's refusal to accept of the proposed trust, and in Mr. H. Thorn's refusal to give the mortgage requested.

"This action was commenced on the 29th of October, 1855. Before it was commenced, and after the said marriage contract was executed as aforesaid, the defendants executed to the New

York Life Insurance and Trust Company, a mortgage of the said premises, mentioned in the said marriage contract as Elmwood, to secure the payment of $70,000, which mortgage yet exists of record in full force, and is wholly unsatisfied.

"The said marriage contract is valid by the laws of France, where it was made, and obligates each of the defendants to do and perform all of the acts which they severally thereby undertook and agreed to perform.

"The plaintiffs have a right to require the execution by the defendants of a mortgage of the property called Elmwood, to secure to the plaintiffs the payment of the money stipulated by the marriage contract to be paid by the defendants, and the payment of such part of the $74,211 as may become payable, and when, according to such marriage contract, the same shall become payable, and to prevent them from being deprived of such security for the payment of said money, as such property unincumbered by any lien subsequent to the date of the marriage contract would furnish, by the creation of other legal liens thereon, by the defendants, or by either of them.

"Judgment will be entered that the contract be specifically performed, and that the defendants execute to the plaintiffs a mortgage of Elmwood, the form and terms of which judgment will be settled, on notice, to conform to the decision made herein."

The defendants formally and severally excepted to the several findings of fact and conclusions of law.

A judgment was entered in conformity to the decision, which judgment contains this provision, viz.:

"And it appearing that the said defendants have already executed a mortgage for the sum of seventy thousand dollars on the property hereinbefore described, and which is a lien thereon, and the execution and delivery of which mortgage is against the true intent and meaning of the said stipulation in the marriage contract or agreement as above referred to, it is therefore further ordered and adjudged that the said defendant, Herman Thorn, do, within six months after being served with a copy hereof, remove or extinguish said mortgage, so that it shall not be a lien on said premises prior to the mortgage herein directed to be executed by said Herman Thorn and Jane Mary Thorn his wife, and in the same manner that he remove or extinguish any other

mortgage which may be a lien on said premises, and executed, or caused to be executed by them, since the execution of the marriage contract or agreement containing the stipulation above referred to."

The following opinion accompanied the decision made at Special Term:

BOSWORTH, J. It is satisfactorily proved that each of the defendants signed the contract in question, and that it was drawn by and entered into, before the officer prescribed by the laws of France, in respect to the drawing, and solemnizing of contracts of that nature.

By its terms, the defendants contracted to secure the payment of the stipulated dowry, at the time and on the events specified, by a mortgage of "Elmwood."

The statute of frauds interposes no barrier to the plaintiffs' right to recover. The contract was made on a valuable consideration, and has been fully performed on the part of the plaintiffs, and of course Mr. Thorn can be required to perform it specifically. In respect to this contract and its specific performance, Mrs. Jane Mary Thorn will be treated in equity as a *femme sole.* (2 R. S., p. 135, § 10; 2 Story's Eq., ch. 36, p. 596.)

The statute of limitations is set up as a defense. The contract was executed in Paris, France, June 4, 1842.

The defendants returned to the State of New York in September, 1845, and since then have resided in this State. This action was commenced in October, 1855.

Application was made to Mr. Thorn, in April, 1855, to perform the contract specifically.

The defendant, Herman Thorn, answered another application on the same subject, of the date of May the 21st, 1855, through his attorney, Mr. Stevens, who, by a note addressed to plaintiffs' attorneys, of the date of June the 7th, 1855, says:

"In answer to your letter to Herman Thorn, Esquire, of 21st of May last, I am directed by him to state, that irrespective of any legal obligation on him, under and by the referred to agreement, and leaving that question out of consideration, his inclinations prompt him to secure to Madame De Pierres the amount, mentioned in said agreement, on Elmwood."

Then followed a proposition to secure the amount by a charge of it upon Elmwood, by an instrument in form and effect different from a mortgage.

The parties were occupied in considering this suggestion, and instruments prepared with a view to carry it into effect, until negotiations ended in disagreement.

The proposed instrument for securing the payment of the sum stipulated in the marriage contract, was a deed of Elmwood to a trustee, in trust, and upon trust, designed to secure the result stipulated by the marriage contract.

Under date of September the 27th, 1855, Mr. Thorn, by his attorney, wrote to the plaintiffs' attorneys as follows, viz.:

"SEPTEMBER 27th, 1855.

"Messrs. MANN & RODMAN:

"Gentlemen—Col. H. Thorn desires me to say in reference to the agreement between him and Baron De Pierres and wife, that he is ready to execute the instrument submitted to you as the attorneys of De Pierres. He conceives the De Pierres will be fully thereby secured; that the agreement will be literally and in spirit carried into effect, and that in case of necessity for sale he will avoid obstacles in closing sales with respective persons, which would exist in giving the mortgage to the Trust Company, who could not exercise any discretion as an individual might. In his behalf, I therefore tender and offer in performance of the marriage contract, an execution of the submitted instrument of Col. Thorn and wife.

"Yours obediently and respectfully,

JOHN B. STEVENS,

"Attorney of H. Thorn."

The contents of this instrument are not disclosed by the evidence.

These communications are a full acknowledgment, in writing, of a then existing obligation to execute the special provisions of the marriage contract, and contain a tender of that which the parties claimed to regard as an execution of it literally, as well as in spirit.

But the time of payment of the sum contracted to be secured has not yet arrived, and the contract is therefore in force as to the debt or sum to be advanced and the promise to pay it.

The 6th Article of the marriage contract, contains this clause, viz.:

" For the security and guaranty of the payment of the said sum of four hundred thousand francs, or seventy-four thousand two hundred and eleven dollars in principal and interest, Mr. and Madame Thorn charge, bind and mortgage specially with full solidarity between them, the estate already above indicated, called Elmwood, situate near the city of New York, in the village of Bloomingdale."

This is an equitable mortgage of Elmwood, to secure the payment of the stipulated sum. That sum is to be paid in the future, and the equitable mortgage created by the clause quoted is still in force, and the plaintiffs have a right unimpaired by the statute of limitation to be protected by the execution of an actual legal mortgage, which will prevent their equitable claim from being destroyed by voluntary mortgages or conveyances to purchasers in good faith.

By the 6th Article of the marriage contract, Mr. and Madame Thorn declared themselves to be the owners of Elmwood, and bound themselves to prove title thereto regularly, within a delay of six months; that it was of the value of $200,000, and was incumbered to the amount of only $24,000, and that such mortgage was in favor of Demoiselle Thorn, the then intended, and present wife of Baron De Pierres.

To avoid any breach of the marriage contract, the sum, which, in consideration of the future and then intended marriage of their daughter, the defendants promised to pay the plaintiffs, and to secure to be paid by a mortgage of Elmwood, should be made, by the execution of a formal mortgage, a specific legal lien, which can be enforced as a lien prior to all incumbrances, other that recited in the marriage contract as then existing.

The letter of the 7th of June, 1855, already referred to, states that, at its date, Elmwood was mortgaged to secure the payment of $70,000.

This, of itself, will prevent the plaintiffs from having the full benefit of such a security upon Elmwood, as the marriage contract in terms creates, and as the defendants by it, agreed to secure by a formal mortgage.

The fact of such a mortgage having been given, and the hazard of others being executed which might disable the plaintiffs from realizing from Elmwood any security for the payment of the sum agreed to be paid, are sufficient to justify the interposition of the Court for the protection of the plaintiffs.

Even if such a contract, and in such form, had been made in this State; as it has been in part executed, there would be no obstacle in the way of requiring the defendants to execute a legal mortgage to preserve to the plaintiffs their equitable rights under the contract.

If the estate is that of Madame Thorn, she was capable in equity to charge it, and has done enough to accomplish that result.

If that of Colonel Thorn, the same result would be effected as to her contingent interest in it.

It is for the plaintiffs to cousider whether some instrument which the defendants may be willing to execute, will not be a better protection than a mere mortgage.

They are entitled, however, to a judgment, that the provisions of the contract be specifically performed. The judgment must be settled on notice to the adverse party. The question of costs is reserved until that time, when the parties will be heard in relation to it.

Judgment having been entered, the defendants appealed from it to the General Term.

F. B. Cutting, for appellants, (the defendants,) made and argued a distinct set of points for each defendant, as follows.

POINTS ON BEHALF OF HERMAN THORN.

The judgment of the Special Term should be reversed as to the defendant, Herman Thorn.

I. The evidence did not prove a due execution of the alleged marriage contract.

II. If signed by Mrs. Thorn, it imposed no legal obligation upon her; the instrument purports to be joint and several on the part of Mr. and Mrs. Thorn; if void as to Mrs. Thorn, a specific performance should not be decreed as against him.

III. The alleged contract, as far as it attempted to charge or incumber real estate, is void by the statute of frauds. (2 R. S., 134, § 6.)

The description of the real estate is void for vagueness and insufficiency.

IV. If any cause of action ever existed against the defendants, it was barred before the commencement of this action by the statute of limitations. (2 R. S., 301, 302, § 52; 5 Ves., Jr., 720, note 6.)

1. The right existed (if at all) from the time of the execution and delivery of the instrument.

2. Mr. Thorn had been a constant resident of this State during more than ten years prior to the commencement of this action.

3. He has not, by any intermediate promise or act, waived or relinquished this defense.

V. The judgment should be set aside, because it grants relief not asked for—it grants a relief beyond the cause of action. The complaint is for the specific performance of an alleged agreement.

The judgment for the removal of the mortgage to the Trust Company should be set aside; because,

1st. It is a relief not within the pleadings, and not sustained by competent testimony in the cause.

2d. It is a relief which, in an action for specific performance, could not be granted, and a relief only grantable in an action in aid of a specific agreement.

3d. The pleadings do not ask it—the plaintiff has not demanded any amendment of pleadings to conform the judgment to facts proved.

VI. Whether in any case a specific performance should be decreed, rests in the sound judicial discretion of the Court. In the exercise of its jurisdiction, it will have an eye to substantial justice between the parties, and if it shall interfere to enforce the contract, it will do so in a manner that will not work any unnecessary hardship upon, or damage to the defendants. (4 Kent's Com., 493–495; 1 Sug. on Vendors, 235, and note; 1 id., 238; *Pigg* v. *Corder*, 12 Leigh R., 69; *Carr* v. *Duval*, 14 Peters, 77.)

VII. The judgment of the Special Term is erroneous; because,

1. It goes beyond the terms of the alleged marriage contract, and orders the defendants to execute, acknowledge and deliver to Mrs. De Pierres a conveyance, by way of mortgage, of the land described in the judgment; whereas the last clause of the 6th

Article of the said contract, merely declared that an entry of record (inscription) of that instrument should be made.

The Special Term was misled by the erroneous translation by Mr. Eckel of this part of the 6th Article. (1 Trop., 405, art. 2106.)

The finding of the Special Term that Mr. Eckel's translation is correct, is erroneous.

The answer to the interrogatories corroborate Coudert's translation of the latter part of the 6th Article of the marriage contract.

The words "*Il sera pris inscription,*" were translated by Eckel: "A mortgage shall be registered;" by the witness Coudert: "There shall be made an entry of record."

The answer to the 8th, 9th and 10th cross-interrogatories, show that the entry of record was, as to this contract, made in the special register belonging to the *Enregistrément de Domaine.*

The witness Deseours says this formality was complied with.

2. To execute and record a mortgage of the tenor set forth in the judgment will produce ruinous results and a probable sacrifice of the whole property.

The letters of Mr. Stevens state and explain the disastrous consequences that will ensue from it. These letters were read in evidence by the plaintiffs, and are competent proof of the facts contained in them.

3. The modification proposed by Mr. Stevens, on behalf of Mr. Thorn, was reasonable and a substantial compliance with the spirit and intent of the contract. If the Court shall interfere in favor of the plaintiffs, it should direct a form of security that will not endanger the safety of the estate, or necessarily entangle it.

VIII. It was the duty of the plaintiffs, before commencing the action, to have prepared, and tendered to Mr. Thorn for execution, such an instrument as they claimed they were entitled to.

IX. The decree of the Special Term should be reversed.

POINTS ON BEHALF OF MARY JANE THORN.

The plaintiffs did not prove any cause of action as against Mrs. Thorn, and as to her, the complaint should have been dismissed by the Special Term.

I. The execution of the alleged marriage contract by Mrs. Thorn was not properly proved. No subscribing witness was

examined. The notaries were not personally acquainted with her, and did not prove an execution by her of the contract.

II. If the evidence that Mrs. Thorn signed the paper be sufficient, the mere act of signing it cannot prejudice her right to dower in the property called Elmwood, because there is no proof of her assent evidenced by her acknowledgment thereof in the manner required by law to pass the estates of married women. (1 R. S., 742, § 16; id., 758, §§ 11 and 12.)

The instrument and its execution being ineffectual to affect her interest in real estate, she should not be ordered to join in a mortgage thereof to the prejudice of her right of dower.

III. The alleged instrument, as far as it attempts to incumber said real estate, is void by the statute of frauds. (2 R. S., 134, § 6.)

IV. The description in the alleged instrument of "a property called Elmwood, situated near the city of New York, in the village of Bloomingdale," is insufficient. Its vagueness cannot be helped out by parol. (2 R. S., § 6.)

If parol evidence were admissible for that purpose, no proof has been given which identifies the property intended. In this respect the finding of the Special Term is not authorized by the testimony.

V. If the execution of the instrument by Mrs. Thorn had been proved, still being at the time a *feme covert*, she had no capacity to contract an obligation for the payment of money jointly and severally with her husband, as stipulated in the 6th Article of the marriage contract. (2 Roper, Husb. and Wife, 235, 238; *Jackson* v. *Vanderheyden*, 17 Johns., 167; *Carpenter* v. *Schermerhorn*, 2 Barb. C. R., 314.)

1. The money promised to be paid was not for the benefit of herself or her separate property.

2. There is no averment in the complaint that she was seized or possessed of any separate estate, real or personal, or that she contracted with reference to any separate estate.

3. The evidence proves that the property called Elmwood belonged to Herman Thorn.

The recital in the alleged contract, (art. 6,) that Mr. and Mrs. Thorn were the owners of the said property by inheritance was an error.

VI. If the plaintiffs ever had the right to maintain an action against Mrs. Thorn, to compel the specific performance of the

alleged agreement, such right was barred by lapse of time prior to the commencement of this suit. (2 R. S., 301, 302, § 52; *Milward* v. *Earl of Thanet*, 5 Ves., Jr., 720, note *b.*)

1. The right existed (if at all) from the time of the execution and delivery of the instrument.

2. Mrs. Thorn had been a constant resident of this State during more than ten years prior to the commencement of this action.

3. She has not by any intermediate promise or act waived or relinquished this defense.

The correspondence between Messrs. Mann and Rodman and Mr. Stevens is not evidence against her.

The 7th, 8th and 9th points on behalf of Mrs. Thorn, are in substance the same as the 5th, 6th, 7th, 8th and 9th points made for Mr. Thorn.

Abijah Mann, Jr., for the respondents (the plaintiffs).

I. The 6th Article of the marriage contract involved in this case, is a legal and binding contract by the laws of France, and by the principles of equity jurisprudence in the State of New York is an equitable mortgage and an agreement to execute a mortgage and record the same in New York on the property referred to therein, called "Elmwood," situate in the county of New York. The object of the contract was to give a lien upon the property for the security of the advancement in the contract, in consideration of the marriage of the plaintiffs. (See English translation of Napoleon Code, §§ 1440, 1547, 1394, 1124, 1548, 1538, 1544, 1545, 1546, 1431, 1432, 1438, 1439, 1440, 1547, 1125.) The Code Napoleon was admitted in evidence by consent.

II. Madame Thorn is equally bound by the contract with her husband, both by the French law and the principles of equity in the State of New York. (*Stead* v. *Nelson*, 2 Beav. R., 245, 248; Story on Eq., 3d ed., §§ 1397, 1398, 1399, 1399*a.*; Story's Eq., ch. 36, p. 596, referred to in Judge's opinion; *Jaques* v. *The Methodist Episcopal Church*, 17 J. R., 548; *Gardner* v. *Gardner*, 22 Wend., 526; *Jaques* v. *Methodist Episcopal Church*, 17 id., 592, 593.)

III. The defendants, in the marriage contract, declare themselves to be the owners of the property called "Elmwood," by inheritance, and bind themselves to prove their title. This, by

the French law, is a warranty of title; and independent of that admission, by the French law a contract of marriage and advancement is a warranty of title, and the defendants are estopped, both by that law and the principles of equity in this State, from denying their title. In the answer they also declare the property is their own absolute property. (See Code Napoleon, §§ 1547, 1546, 1440.) "Those who settle a dowry are bound to warrant the object settled." (Id., §§ 1547, 1440.)

IV. The property mortgaged is described in the contract as "the estate above indicated, called Elmwood, situate near the city of New York, in the village of Bloomingdale," and is particularly described at folio 13 in the complaint, being the same description as in the judgment. This description is admitted by the answer to be correct.

V. At folio 272 of the Case, and thence following, an abstract (admitted by consent in evidence), is set forth. It states that there is a mortgage by defendants recorded in New York, on the same property, for $72,222.22, recorded 7th June, 1853.

At folio 221 of the Case, it is stated to be admitted by the defendants that there was an existing mortgage for $70,000, meaning the above, to the Trust Company, on the property, which was executed by the defendant, Herman Thorn, since the marriage contract. This fact appears also at folio 210 of the Case, and is found by the judge as a fact at folio 284 of the Case. Such being the case, the plaintiffs are entitled to apply to the Court to have a legal mortgage executed, to be recorded in order to prevent the defendants from committing other frauds on the marriage contract, by conveying or mortgaging the property and defeating the security intended by the contract. And this, even, independent of the provision in the contract, by which the defendants agree to execute and record a mortgage in favor of the plaintiff, Mrs. De Pierres.

VI. The provision in the 6th Article of the marriage contract, stipulates that "a mortgage shall be registered, *in favor of the future wife*, against Mr. and Madame Thorn, and mention (by mistake in Case, *mentioned* is used), will have to be made in said mortgage of the reservation of the right of retraction stipulated in favor of Mr. and Madame Thorn." (See Eckel's translation on part of plaintiff.)

The contract, therefore, having been executed before a Notary, and necessarily by law being executed before a Notary, those facts rendered it necessary that the Notary should make an inscription or minute of it in his repertoire, consequently there was no necessity of inserting in the contract a special provision that this inscription or minute should be made. This is conclusive evidence that Eckel's (the plaintiffs' witness) translation of the contract is correct, and that the translation of Coudert (the defendants' witness), is incorrect. The translation by plaintiffs' witness, that "*a mortgage shall be registered*," is consistent with the plain intention of the parties, the defendants being Americans and the property in New York, and removes the suspicion that the defendants intended a fraud on the plaintiffs.

Eckel (plaintiffs' witness), says, "*inscription hypothecaire*" means "mortgage;" the word "hypothecaire" is omitted. But take "inscription" with what precedes immediately in the contract, and it is manifest the parties intended a mortgage to be recorded. It is pretended on the part of the defendants and their witness, that the object of an *inscription*, by the French law, is to give notice to creditors. But surely, in the present case, an *inscription* in that sense in France would be perfectly nugatory, the property being in New York. It is plain, therefore, a record of the mortgage in New York was intended, that being the only notice to creditors and others that would be available.

VII. The statute of frauds does not apply to this case. The contemplated marriage of the plaintiffs was a valuable consideration, and has been performed. The statute of frauds enacts, "That it shall not be construed to abridge the powers of Courts of Equity to compel the specific performance of agreements in case of part performance." (2 R. S., 4th ed., 316, § 10.)

VIII. The contract was executed by both defendants. The Notary who proves it subscribed his name as a witness. The original remains a record with the Notary in France.

IX. The statute of limitations does not apply to this case; because the plaintiffs have a right at any time to apply to the Court for the purpose of preventing the defendants from committing a fraud on plaintiffs' equitable rights. The contract is a continuing one. And again, the statute does not apply, because the mortgage to be registered was for the benefit of Mrs. De Pierres and

in her name. No cause of action accrued until the marriage of the plaintiffs. The contract could not be enforced till then, and the plaintiff, Mrs. De Pierres, was then under the disability of coverture, which is excepted from the statute.

Even if that were not so at the time of the execution of the contract, the defendants were in France and continued there in fact and presumption of law, in the absence of evidence to the contrary, up to the time of the marriage. Consequently, Mrs. De Pierres was then under the disability of coverture, and the defendants, being in France, the statute would not begin to run, and at the time the defendants arrived in New York, to wit, on the 29th September, 1845, when the cause of action accrued in this State, the disability existed.

Again, if the statute did apply, the correspondence between the plaintiffs and defendants, as set forth in the Case, has waived the statute. (2 R. S., 4th ed., 498; also 3d ed., 395.)

The contract was signed in Paris, and marriage immediately followed. The defendants returned to the State of New York in September, 1845.

X. No tender of the mortgage was necessary to be made to the defendants after their refusal to execute one; and a tender was in fact made. (*Bellinger* v. *Kitts*, 6 Barb., 273.)

And especially where the plaintiffs have executed their part of the agreement.

XI. The facts found by the Judge who tried the cause, are all sustained by the evidence. At all events, there are sufficient facts found and sustained by the evidence to justify the judgment made in the case.

By the Court—Hoffman, J.

I. I shall first examine the case in regard to the defendant Herman Thorn. The counsel has presented points upon his position under the contract, and as to the judgment against him, separate from the case of his wife; and some distinct questions necessarily arise.

1. The execution of the instrument is sufficiently proven.

I am satisfied by the evidence, that everything necessary to authenticate it, by the law of France, was observed. Even if it is not the rule that proof of the execution of an instrument suf-

ficient at the place of execution, is sufficient where it is to be enforced, yet we have the Notary deposing that he saw the parties sign the document; that his own name is written at the beginning of the contract, (the mode of attestation in use in France,) and that he signed it in his capacity of Notary Public. (See *Brown* v. *Thornton*, 1 Nev. & Perry, 348; 6 Adol. & Ellis, 185; *Alivon* v. *Furnival*, 1 Crom., Mees. & Rosc., 277; in the matter of *Marianne Clericetti*, 30 Eng. L. and Eq. R., 582; *Regina* v. *Newman*, 18 id., 113.) It is proven that the original cannot be removed from the proper office except by an order of a French tribunal, and that transcripts attested as in the present case are admitted in evidence throughout the Empire.

2. I regard the question to be wholly immaterial, whether the translation of the last clause of article 6 of the contract is such as the plaintiffs, or such as the defendants claim it to be. Whether it stipulated for a mortgage to be recorded in New York, (and hence to be duly acknowledged or proven,) or merely for the registration in the proper office in France, as seems alluded to by the witness Descours, is of no importance. Herman Thorn, in the clearest language "charged, bound and mortgaged" the property in question.

In the view of a Court of Equity this was an effectual mortgage against him, and against all volunteers under him, and upon the settled doctrine of such a Court, the party would be compelled to execute any instrument, and do any act, necessary or proper, to give effect at law to what was thus effective in equity. (*Varick* v. *Edwards*, 1 Hoff. R., 391, and cases.)

Ellis v. *Nimmo*, (1 Ll. & Goo. t. Sug., 333,) deserves particular attention. There was an agreement in writing signed by the father, after the marriage of his daughter, to secure her £50 per annum out of the rents of a farm, and to execute the necessary deed to that effect when called on. Lord Chancellor SUGDEN compelled a specific performance. He said, "The Court requires a sufficient consideration, and I find a provision for a wife or child is held a meritorious consideration proper to call into action the power of a Court of Equity in aid of a defective execution or surrender. Now, in my opinion, it makes no difference whether that power is required to aid a defective surrender, or to enforce an agreement resting *in fieri*. I have a contract before me which

I am bound to enforce, if there is a sufficient consideration. The consideration is such as would enable the Court to remedy even a defective settlement, where there is no contract. I think it sufficient *a fortiori* to sustain an actual contract."

Again he says, "Upon a covenant to stand seised, for the benefit of a wife or child, equity held such a consideration sufficient to bind the estate. That was a use before the statute, that use the statute executed and turned into a possession; still it rested upon the original equity. A covenant to stand seised was merely an agreement founded on a good or meritorious consideration, and the statute executed that agreement."

Had the effectual charge or mortgage in this case been a covenant to charge or mortgage, the relief sought would have been necessarily granted. It would be strange if the case was weakened by the absolute nature of the act and force of the language employed.

3. The next question I shall examine, of those raised by the counsel of the defendant H. Thorn, relates to the effect of the statute of limitations.

The contract was dated the 4th of June, 1842, and the marriage took place two days afterwards. I consider that the contract did not go into effect so as to give any right of action under it until the marriage brought its consideration into force.

The defendants continued to reside in Paris until sometime in 1845. On the 29th of September of that year they arrived in New York, in which place they have since continued to reside. The present action was commenced on the 29th of October, 1855. The plaintiffs have resided since their marriage in France.

The disability of the plaintiff, Madame De Pierre, existed when the marriage contract went into effect, and now continues. The statute never began to run against her. The question as to the husband is of more uncertainty.

The counsel of the defendants refer to cases of which *Milward* v. *Thanet*, (5 Ves., 720, n. b.,) is an example. They were cases of bills for specific performance, in which a peculiar rule prevails, that the party seeking an execution of a contract must show himself ready, prompt and eager.

Since the Revised Statutes of 1830, covering every imaginable case of relief in a Court of Equity, and fixing a statutory limita-

tion in each, I have supposed that the doctrine of a Court of Chancery as to lapse of time, and the analogy to the old statutes of limitation, was at an end. The Legislature had substituted a definite and comprehensive rule.

The Code has left this case to be governed by the provisions of the Revised Statutes. The right of action accrued before it went into effect. (§ 73.)

It was a case of exclusive jurisdiction of a Court of Equity before the Code, and the 52d section of the statute would apply to it. (2 R. S., 301.) I pass over the question whether the 51st section could bear upon the case, on the ground of a discovery of the alleged fraud by incumbering the premises with the mortgage of $70,000. This remark may, however, be made, that the pleadings contain nothing relating to this incumbrance. It seems to have been discovered during the proceedings. We do not know its date, nor when it was discovered by the plaintiffs. This would be important, and should be proven or admitted. (*Boggs* v. *Rathbone*, 4th June, 1849, before DUER, CAMPBELL and MASON, S. C., General Term, 10th December, 1858, Superior Court.) I do not perceive how this matter can now be considered, in any bearing, upon the point of the statute of limitations.

But even on the supposition that the husband is barred and the wife is not, this action can, in my opinion, be sustained. It is true that "when once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action." (STORY, J., in *Marsteller* v. *McLean*, 7 Cranch, 156.) That case decided that a plea of the statute of limitations where only some of joint tenants plaintiffs were under disability, was good. So in *Perry* v. *Jackson*, (4 T. R., 516,) a plea of the statute good as to one partner, availed as to both in a joint action. *Roe* v. *Rowlston*, (2 Taun., 441,) determined that the disability of one copartner did not save the other from the operation of the statute, against whom it ran. The disability of the sister was coverture.

In a series of cases a distinction is taken between cases in which the right is joint, and where it is several.

In *L.e* v. *Barksdale*, (2 Brock. R., 436,) there was a demise by several co-lessees as heirs at law, in an ejectment. Six were under disability when the cause of action accrued, and were not

barred by the statute. One of them was barred. Chief Justice MARSHALL said, had they claimed in severalty, it was clear the six could recover, and the defendant would succeed as to the other. Joint and several demises were laid in the declaration, and the Court allowed a recovery precisely according to the shares barred, and the one not barred.

See, also, *Henry* v. *The Executors of Means*, (2 Hill's S. C. R., 328,) and *Ritchens* v. *Craig*. (1 Bailey, 119.) The rule in South Carolina appears to be, that the infancy of one plaintiff will save the statute as to the others; but not so in other cases. Those against whom the act has run cannot recover.

In *Neal* v. *Robertson* (2 Dana's Ky. R., 86,) it was held that a husband suing alone, or with his wife, may be barred by the statute running against him, although upon the cessation of the coverture, she would have the right to sue. This decision was recognized in *Downing's heirs* v. *Ford*. (9 Dana, 392.) See, also, *The State* v. *Wilson's Adm.*, (3 Harrington's R., 348,) and *McDowell* v. *Potter*. (8 Barr., 189.)

Now what is the legal interest and position of Madame De Pierres as to the property in question?

Those rights, as defined by the marriage contract, appear to be these: The community of interests is limited, and all property brought in by the parties is excluded, (Art. 7,) hence the wife and her heirs will be entitled to the amount brought in by her, in case she survives her husband. This dowry given by her parents will, in that case, go to her. In case of her dying first, her heirs would take it, (Art. 9,) but the income of one-half of the property would then go to her husband for his life, he causing an inventory to be taken in presence of her heirs. (Art. 11.) There are some other clauses not necessary to be stated, such as the one relating to the right of *præciput* in the survivor, to be exercised before a division of the estates brought in.

I do not clearly understand whether, under Article 7 or otherwise, the income of all that was brought in by each is to be held in community or not. I presume it was not. The savings only are mentioned.

This instrument has, by the French law, as I understand it, the full effect of leaving or vesting the property, or title to the estate in question, in Madame De Pierres, with the eventual benefit

to the husband referred to, and with the right of administration as it is termed, in him. This seems the result of several sections of the treatise of M. Touillier *Du Contrat du Marriage.* (*Droit, Civile Francaise, tom.* 12, §§ 380–383.) The administration of movable or unmovable property excluded from community (*realisés*) belongs to the husband, unless there is an express agreement to the contrary. And this administration involves the right to receive the revenues. See, also, the authority cited in *Le Breton* v. *Miles.* (8 Paige, 261.)

Strangers merely resident in France are affected upon marrying, by what is termed the Legal Community (*la communauté legale*), and much more by a conventional one. (*Touillier, tom.* 12, § 91, p. 131.)

By a general rule of law, this contract establishes the rights of the plaintiffs as between themselves according to its provisions as interpreted by the French law, and gives to each the powers incident by that law to the estates or interests created; (*Le Breton* v. *Miles*, 8 Paige, 261; *Duncan* v. *Cannan*, 23 Eng. L. and Eq., 288;) provided there is nothing prescribed in our own law incompatible with the interests, estates and rights thus created. So far is this from being the case, that I think the contract is in entire harmony with our law, and it results that Madame De Pierres has a separate estate, as we would term it, in this property, which neither her husband nor his creditors could reach or affect, by the law of France, or by our own. The reversion, at least, is to her if she survive, and to her heirs if she die first.

That this right and interest would entitle her to commence this action, and perhaps alone, seems clear. (Code, § 114.) And that under our present system, the union of the husband with her, if objectionable at all, cannot now be taken, is also plain. (Code, §§ 148, 144; 20 Barb., 342; 12 How. Pr. R., 134.) And judgment could be given in her favor, even if the bar of the statute as to him was deemed insuperable. (§ 274, sub. 1.)

The learned Judge at Special Term treated the communications in evidence as a full acknowledgment in writing of the existing obligation to execute the marriage contract.

Without passing upon this question, we prefer putting our decision on this part of the case, upon the ground I have men-

tioned, which presents the point as favorably for the defendants as it can be presented.

It is also answered upon the subject of the statute, that the debt to be secured is not yet payable, and that the obligation to perfect the security is commensurate with the duty to pay the demand, and the statute cannot begin to run as to one until it begins as to the other. It may be questioned whether, when there is a distinct obligation to pay a debt at a future unexpired period, and another contract, even in the same instrument, to secure that payment, which duty is binding and may be enforced at once, the statute may not apply to the latter. The contracts and obligations are not merely divisible, but are separated, independent, and in their nature different. We, however, do not find it necessary to determine this point.

There remains one other point. The judgment directs Mr. Thorn to pay off the mortgage of $70,000 to the Life and Trust Company, within six months.

By the contract the rents and profits of this property belong to him during his life. The dowry was to be paid one month after his decease, if he survived his wife; and the property would revert to him absolutely, I apprehend, upon his daughter dying childless before him, or if her children should so die. This is only subject to the *usufruct* of a moiety for life, given on a certain event to the Baron De Pierres. (Art. 6.)

Mr. Thorn had, then, a mortgagable interest and estate in the property, viz., his life estate and the contingency of obtaining the reversion.

There is also some ground for supposing that the property is of ample value to discharge all the incumbrances, including the mortgage to be given under the contract.

Still the scope and justice of the stipulation was, that the mortgage to guaranty payment of this dowry should be a mortgage to take effect at its date; to preclude any subsequent incumbrances impairing the value of the security or embarrassing its enforcement. The mortgage to the Trust Company was in violation of this right, and of the correlative duty of Mr. Thorn. Upon the whole, we think that the judgment below cannot be interfered with in this particular.

II. I shall next consider the case in relation to Mrs. Thorn and the judgment against her.

The proof of the execution of the marriage contract was, as before stated, sufficient to establish it upon the trial as against Mr. Thorn, and of course against Mrs. Thorn, unless some difficulty arising from her coverture exists.

At the date of the instrument, the domicile of Mrs. Thorn, following that of her husband, as well as constituted by birth, was in New York; the lands which the agreement was to affect, were in this State; but she and her husband had resided in Paris for a number of years before its execution. The title to the property was in Mr. Thorn, and she had only an inchoate right of dower in it.

I shall assume that by the laws of France she had effectually mortgaged or hypothecated the property, had it been situated in that country.

The objection still is great. No point is better settled than this: that as to real estate, the law of the country where it is situated is to control in all respects; in relation to the enforcement of instruments; to methods of charging or transferring, and to remedies in relation to it; "a title or interest in land can only be acquired or lost agreeably to the law of the place where the same is situated." (*Hosford* v. *Nichols*, 1 Paige, 220; *Cutter* v. *Davenport*, 1 Pick., 81; *McCormick* v. *Sullivant*, 10 Wheat., 192, and cases; *Warrender* v. *Warrender*, 9 Bli., 127; *Monroe* v. *Douglass*, 1 Seld., 447; and 4 Sandf. Ch. R., 126.) "The validity of every disposition of real property, whether testamentary or *inter vivos*, must depend upon the law of the State where the lands are situated." (*Eyre* v. *Storer*, S. Ct. New Hampshire, Month. L. R., Oct., 1858, p. 362; see, also, *Waterhouse* v. *Stansfield*, 13 Eng. L. and Eq. R., 465; *Chapman* v. *Robertson*, 6 Paige, 627.)

At the date of this instrument the title to the property was in Herman Thorn, and his wife had only an inchoate right of dower. If she had executed it in the same manner in New York, it would have been wholly inoperative. (1 R. S., 758, § 10; *Elwood* v. *Klock*, 13 Barb., 50–54; *Albany Ins. Co.* v. *Bay*, 4 Comst., 9.)

The counsel of the plaintiffs refers to cases which are plainly distinguishable. They are cases of a separate estate in the wife, technically so known in a court of equity. As to such an estate,

she is treated as a *feme sole*. *Stead* v. *Nelson*, (2 Beav., 245,) where an agreement to mortgage was carried into effect, was of this nature. But to treat an inchoate right of dower as separate estate would be novel. The opinions of both Justice JEWETT and Justice PRATT, in *The Albany Insurance Company* v. *Bay*, (4 Comst., 9,) settle this point very clearly.

It is urged that by the 6th Article of the contract the defendants declare themselves to be the owners of the said property by inheritance, and bind themselves within six months to prove their title thereto.

These words would perhaps warrant the inference of the estate in them being of that peculiar character which a conveyance to husband and wife creates. (*Jackson* v. *McConnell*, 19 Wènd., 175.) Yet that would be a legal estate, not a separate one, in the sense of a court of equity. If the words indicate a tenancy in common or joint tenancy, the result is the same. And if they could bear a construction of the inheritance, being in Mrs. Thorn, solely, there would be no difference.

The 11th section of the statute, however, (1 R. S., § 758,) "of the proof and recording of conveyances," raises the question whether the proof of the execution of the instrument, if sufficient against her husband, is not equally sufficient as against her, so that whatever rights may be adjudged against him upon it may be equally adjudged against her. Upon a careful consideration, I think that this is the result. The letter of the provision undoubtedly warrants this. With a transposition of clauses, it may be properly and grammatically read thus: When any married woman, not residing in this State, shall join with her husband in any conveyance of real estate situated within this State, the proof of the execution of such conveyance may be the same as if she were sole, and the conveyance shall have the same effect as if she were sole. By section 38, the term "conveyance embraces every instrument in writing by which any interest in real estate is mortgaged, or may be affected in law or equity," with certain exceptions, hereafter noticed.

I believe the first act which contained any provision as to the execution of deeds by married women, abroad, was that of the 8th of March, 1773. (Van Schaack's ed. Laws, p. 765.) It re-

quired the solemnity of an acknowledgment on a private examination before certain designated officers.

Then on the 6th of April, 1792, (2 Green., 452,) it was enacted, "that in all cases when any married woman, not residing in this State, shall join with her husband in the sale of any lands situate in this State, and shall join in and execute, seal and deliver the conveyance of such lands, every such woman shall be thereby barred of and from all right and claim of dower in the lands, &c., so conveyed."

By the act of 6th April, 1801, (1 Webs. & Sk., 478,) this provision was reënacted with variations and additions so as to read as follows, "that where any *feme covert* not residing in this State shall join with her husband in any deed or conveyance of or relating to any lands or real estate situate within this State, she shall thereby be barred of and from all claim of dower, and all other right and title therein, in like manner as if she were sole, and the acknowledgment or proof of such deed, conveyance or writing may be the same as if she were sole, and shall entitle such deed, conveyance, or writing to be recorded as aforesaid."

The provision in the "act concerning deeds" in the revision of 1813, (1 R. L., 1813, 370,) was precisely the same.

The 11th section of the Revised Statutes of 1830, is, with immaterial changes of language, precisely the same, omitting, however, the clause, "and shall entitle the deed, &c., to be recorded."

In *Jackson* v. *Gilchrist*, (15 John. R., 91,) the decision turned upon the effect of a particular statute of the year 1771, but the opinion of the Court, and arguments of counsel laid the foundation of the proposition now settled, that the common law mode of fine and recovery, to pass the real estate of a *feme covert*, did not prevail in the colony of New York, but by usage it would pass by deed. How that was to be executed, was another question.

In *Constantein* v. *Van Winkle*, (2 Hill, 240; 6 id.,177, in error,) the Supreme Court held that a deed executed by a married woman in New Jersey, in 1760, of lands in New York, was not valid to pass her interest. It could be done by deed, but an acknowledgment by her in some form, and before some officer, was always deemed essential. But the decision was reversed and unanimously, in the Court of Errors, and two points seem very fully settled by the decision, that by the ancient usage in

the colony of New York, independent of any statute, a *feme covert* might, in conjunction with her husband, convey her interest in real estate by deed, without resorting to fine and recovery, and that by force of a statute of 1771, the deed was valid without any acknowledgment at all.

And I consider that the case goes far to determine that, but for statutory restrictions, and apart from the act of 1771, a deed by the customary law of New York, was good against a married woman without any acknowledgment, and could be proven as if she were sole, being executed with her husband.

Every Senator who delivered an opinion holds this view.

Then in *The Albany Fire Insurance Company* v. *Bay*, (4 Comst., 9,) we find it decided, that by usage and laws of the colony and State, a married woman could convey lands by a deed duly acknowledged, without the concurrence of her husband.

Justice JEWETT, in his opinion, (p. 15,) adverts to the distinction established in sections 10 and 11, depending upon the place of residence of the wife; and although what he says may not be treated as even a positive, deliberate opinion, his expressions favor the view of the proof being sufficient in all cases where it will be so, as to the husband. There is but a single restriction or regulation to be observed by a married woman, residing out of this State, in order to alien her lands situated here. It is that "she join with her husband" in the conveyance.

In *Meriam* v. *Harsen*, (2 Barb. Ch. R., 232–268,) Chancellor WALWORTH says, that the act of 1771 and all the subsequent statutes on the subject are merely restrictive of the right which a *feme covert* possessed by the common or customary law of the colony to convey her estate by deed, with the concurrence of her husband.

In *Bool* v. *Mix*, (17 Wend., 128,) Justice BRONSON takes a similar view.

And Senator BOCKEE begins his review of the statutes with the charter of liberties of 1683, and holds that the whole series indicate a previous customary law, which the statutes were designed to correct and limit. (6 Hill, 180.)

My conclusion is, that whatever testimony is sufficient upon the trial of a cause, to entitle an instrument to be read against a woman, if she were sole, will be sufficient when executed out of

the State, although she is married. This marriage contract is therefore established against Mrs. Thorn.

It results that the Court can adjudge and declare that the instrument does constitute a valid lien, and charge, by way of mortgage upon the property, as against Mrs. Thorn, precisely the same as against her husband.

Still the question remains, can the Court go further and decree and compel her to execute a new mortgage, so as to enable it to be recorded?

That portion of the marriage contract which rests in covenant or contract; as to execute an instrument in such form as would entitle it to be recorded in New York, or to make title in six months, could never be enforced against her, had the paper been executed in this State. (*Martin* v. *Dwelly*, 6 Wend., 9; *Jackson* v. *Vanderheyden*, 17 Johns., 167; *Atwater* v. *Buckinham*, 5 Con. R., 492; *Carpenter* v. *Schermerhorn*, 2 Barb. Ch. R., 314.)

Yet the argument which is to be drawn from the statute, (if our construction of it is right,) is very strong. Connecting the 11th and the 38th sections, we have this provision, that any instrument executed by a married woman abroad, whereby the title to real estate may be affected at law or in equity, shall have the same effect as if she were sole. If, as we clearly hold, the creation of the equitable mortgage, apart from any covenant, justifies the Court in adjudging Mr. Thorn to execute a perfected mortgage, to be recorded, the principle and statute almost conclusively settle the same point as against her.

Yet another clause of the 38th section should not be unnoticed. In defining the term "conveyance," as used in the act, there is the exclusion of "executory contracts for the sale or purchase of lands." And section 39 provides, that "executory contracts for the sale or purchase of lands," when proved or acknowledged in the manner prescribed in the chapter, may be recorded, &c., and be read in evidence.

Thus it may be urged that whatever is contained in the instrument effectually to create a charge or lien by way of mortgage in itself, may be adjudged and established as such against a married woman, while whatever in the same instrument depends upon contract, is executory, as it is not made obligatory by the

act, but is in substance excluded from its operation, must be governed by the general law, viz., the *lex rei sitæ*.

But this clause may, we think, be very properly restricted to contracts for sale, altogether executory, where no estate or interest, legal or equitable, has been created in the land by the instrument in question, but all rests in covenant. And thus the absolute creation of an equitable charge upon the estate or interest Mrs. Thorn possessed, and the obligations incumbent upon her arising from such creation, are governed and shaped by the important 11th section which has been discussed.

The judgment is therefore affirmed, with costs.

JANE CAMPBELL, Executrix, &c., of Daniel Campbell, deceased, *v.* THE INTERNATIONAL LIFE ASSURANCE SOCIETY OF LONDON.

By the terms of one of the printed conditions annexed to a life policy, issued on the 29th of May, 1850, ($2,000 being the sum insured, and $65.40 being the premium payable yearly therefor,) it was declared that policies "will not be considered in force if the premiums remain unpaid beyond thirty days after becoming due; but, on satisfactory proof to the directors that the party or parties assured continue in good health, the policies may be renewed at any period within twelve months, on payment of a fine of ten shillings per cent (half per cent) on the sum assured;" and there was entered on the margin of said policy the words "premium paid on the 31st day of May, 1850, risk commencing 29th of May, 1850, ending 28th May, 1851," and one of the printed "notes" to the printed application for such insurance declared that "the premium must, in all cases, be paid annually in advance;" and the annual premiums were regularly paid in advance, except for the year commencing on the 29th of May, 1857; and in April, 1857, the defendants, by a letter addressed to the assured, stated that the annual premium on his said policy would "be due on the 29th of May next, and unless the same be paid" * * "on or before thirty days from that date, the policy will become void," and the assured, on Monday, the 29th of June, 1857, at about the hour of noon, (Saturday, the 27th of June, being the 30th day in numerical order from the 28th of May, and Sunday, the 28th of June, being the 30th from the 29th of May,) tendered the sum payable annually as premium, which the defendants refused to receive, alleging that the time for renewing the policy and paying the premium expired

before that day, but offering to renew the policy if the assured would go before the defendants' medical examiner and be examined as to his general health, provided the report of said examiner was satisfactory; which the assured refused to do, being at the time an invalid and in failing health; and the assured died a natural death on the 28th of August, 1857, the premium for that year not having been actually paid; it was

1. *Held*, that the tender of the premium made on the 29th of June, 1857, was in time, and that the policy was thereby continued in force, and that the plaintiff was entitled to recover.
2. That Sunday, the 28th of June, was the last day of the thirty days within which the assured had the right to pay such premium, and that the thirtieth day being Sunday, the premium, as a matter of right, could be paid by the assured on the next day thereafter, the day on which it was tendered.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, December 17, 1858; Decided, February 26, 1859.

THE parties to this controversy are Jane Campbell, executrix, &c., of Daniel Campbell, deceased, plaintiff, and The International Life Assurance Society, of London, defendants.

It was submitted to the court under section 372 of the Code. The Case upon which the parties agreed, as containing the facts on which the controversy depends, exclusive of the affidavits showing "that the controversy is real and the proceeding in good faith to determine the rights of the parties," is in the words and figures following, viz.:

"FIRST. The defendants herein are a Society established under the laws of the Kingdom of Great Britain, capable of suing and being sued, located at the city of London, and also transacting the business of life assurance under the laws of this State, through their duly constituted agents hereinafter mentioned, at their agency established for that purpose in the city of New York.

"SECOND. On the 29th day of May, 1850, the said Daniel Campbell, deceased, effected an assurance on his life with the defendants, and took out a policy of assurance thereon for the sum of two thousand dollars for the term of life. A copy of so much of the policy, styled a 'temporary policy,' so taken out and issued to him by the defendants, as is material to the determination of this controversy, is annexed to and made a part of this statement, and no other policy of assurance in lieu thereof, was ever delivered, as is therein provided, to him by the defendants.

"THIRD. The corporate name and style of the defendants at the time the policy was issued was 'The National Loan Fund Life Assurance Society, of 26 Cornhill, London.' Its corporate name has since then been changed to, and now is, 'The International Life Assurance Society of London.'

"FOURTH. The first annual premium for the assurance covered by the said policy was paid in advance by said Daniel Campbell, deceased, and accepted by the defendants, on the 31st day of May, 1850, and continually thereafter the annual premiums thereon were duly paid to the defendants annually in advance by said Campbell, within the time provided for that purpose by the said policy, up to (exclusive of the additional thirty days provided in said policy) the twenty-ninth day of May, 1857.

"FIFTH. Prior to the last mentioned day, and in the month of April, 1857, said Daniel Campbell, now deceased, received a note from the defendants, in relation to said policy, of which the following is a copy:

"INTERNATIONAL LIFE ASSURANCE SOCIETY OF LONDON,
("*Late National Loan Fund Life Assurance Society,*)

"GENERAL AGENT'S OFFICE,
"71 Wall st., New York, April , 1857.

"MR. DANIEL CAMPBELL:

"Sir—The annual premium on your policy, No. 4,710, will be due on the 29th day of May next, and unless the same be paid at the office of the Society's Agent, at Washington, on or before thirty days from that date, the policy will become void.

"Your ob't servants,
"C. E. HABICHT and
"J. G. HOLBROOKE,
"General Agents for the United States.

"STATEMENT.

"Premium,	$65 40
"Interest on Loan,	9 78
"Total amount due,	$75 18

"SIXTH. The thirtieth day in numerical order from the twenty-ninth day of May, 1857, was the twenty-eighth day of

June, 1857, which last mentioned day fell upon, and was a Sunday, and the thirtieth day in numerical order from the 28th day of May, 1857, was the 27th day of June, 1857, which last mentioned day fell upon and was a Saturday.

"SEVENTH. On Monday, the twenty-ninth day of June, 1857, at about the hour of noon, Daniel Campbell, since deceased, tendered, at the office of the defendants' agent, at Washington, to such agent, the aforesaid premium and interest on loan, mentioned in the aforesaid note of April, 1857, of the defendants' general agents for the United States to said Daniel Campbell, which such agent then refused to accept or receive, alleging that the time for renewing the policy and paying the said premium, under the same, had expired before that day.

"The agents of the defendants, at or about the same time, informed said Campbell that if he would go before the defendants' medical examiner, in Washington, and be examined as to his general health, they would renew his policy if the report of the said examiner was satisfactory. Mr. Campbell, at that time, was an invalid and in failing health, and refused to go before such medical examiner.

"EIGHTH. On the twenty-eighth day of August, 1857, said Daniel Campbell died a natural death, not having had any policy delivered to him by said defendants other than the one aforesaid annexed to this statement.

"NINTH. The plaintiff in this controversy is his widow and executrix; and as of the .. day of ....., 1857, has furnished to the satisfaction of the defendants the proof required by them to be furnished in order to establish the claim under the policy, if the Court shall declare it to be in force.

"TENTH. The amount due on the policy, if the Court declare the same to be in force, is the sum of $1,756.37, and interest thereon from the first day of December, 1857. And the defendants admit that if they are liable at all upon said policy, the plaintiff is entitled to receive thereon from them the last mentioned sum and interest. The original policy and the entire printed application for insurance made by Daniel Campbell, an extract from which is hereto annexed, may be used on the argument of this case.

"ELEVENTH. The plaintiff claims that the thirtieth day referred to in said policy and note, on or before which said premium and interest were to be paid, was the twenty-eighth day of June, 1857, and that day having been, as is admitted herein, a Sunday, that said premium was not due and payable until the next day, to wit, Monday, the 29th day of June, 1857, when Campbell tendered the premium to the defendants. The defendants claim that said thirtieth day fell on Saturday, the 27th day of June, 1857; and if the Court should be against them on this claim and hold that such thirtieth day fell on Sunday, the 28th of June, 1857, then the defendants claim that the premium was due and payable on or before that day or the preceding Saturday, the 27th of June, 1857, and not having been paid on or before said 28th of June, 1857, that the policy was not in force, and said Campbell was not entitled to pay said premium after that day, and the parties herein mutually pray for the judgment of this Court.

"Dated New York, March 22d, 1858."

["*Policy referred to in the foregoing statement of facts.*]

("TEMPORARY POLICY.)

"National Loan Fund Life Assurance Society of 26 Cornhill, London, and 71 Wall st., New York.

"I, the undersigned, J. Leander Starr, the special agent and registered attorney of three of the directors of the National Loan Fund Life Assurance Society of London, and the general agent of the said society for the United States, and British North American Colonies, (being duly authorized in this behalf,) hereby declare that the proposal of Daniel Campbell, of Washington city, District of Columbia, Saddler, bearing date the 5th day of April, 1850, for an assurance with the said society on the life of himself for the term of 'life with profits' for the sum of two thousand dollars, hath been accepted, that the yearly premium for such assurance is sixty-five $\frac{40}{100}$ dollars, and that the said Daniel Campbell hath paid the sum of sixty-five $\frac{40}{100}$ dollars, being the annual premium for such assurance, to wit, for the term of twelve months, ending the 28th day of May 1851.

No. 2,862.

Life Assurance for the term of 'life with profits.'

Sum assured $2,000.

"And I hereby undertake to deliver, or cause to be delivered, to the said Daniel Campbell, or his assigns, within three calendar months from the date hereof, a policy of assurance of said society, in accordance with the terms and conditions of the said proposal and declaration, and in the form now in use by the society. And I further declare, that, in the meantime, and until the delivery of the said policy, or in case the said Daniel Campbell shall die before such delivery, this declaration shall, to all intents and purposes, be considered as valid a contract as if a policy of assurance, in accordance with the said proposal, and in the form aforesaid, had been now delivered to said Daniel Campbell; and in such case, the sum assured shall be due and payable at the expiration of three calendar months from and after proof of such claim, to the satisfaction of the Directors of the United States Local Board.

Annual Premium.........$65.40
Policy..... 1.25
$66.65

Examined, R. T. Richardson, Gen. Acct.

Ent'd Jno. Martin. Premium paid on the 31st of May, 1850.

"Dated at the office of the said society, in the city of New York, this 29th day of May, 1850.

Risk commencing 29th of May, 1850, ending 29th of May, 1851.

"J. L. STARR,
"General agent for the United States."

Issued to Phila. (Washington,) Agency.

"NOTE. This instrument is not valid, and is delivered conditionally, until the actual payment of premium, to an accredited agent or sub-agent of the above society, acting within the authority delegated to him, and paid within the time provided for in the note appended to the proposal.

"CONDITIONS OF ASSURANCE.

"Policies, whether the premiums be payable yearly, half-yearly, quarterly, or in any other manner than by a single payment, will not be considered in force if the premiums remain unpaid beyond thirty days after becoming due; but on satisfactory proof to the directors, that the party or parties assured continue in good health, the policies may be renewed at any period within twelve months, on payment of a fine of ten shillings per cent (half per cent) on the sum assured."

Extract from the printed application referred to in the foregoing statement.

"I do hereby declare that my age does not now exceed forty years; that I am now in good health, and do ordinarily enjoy

good health, and that in the above proposal I have not withheld any material circumstance or information, touching my past or present state of health, or habits of life with which the National Loan Fund Life Assurance Society ought to be made acquainted.

"And I do hereby agree that this declaration, and the above proposal, together with the stipulations in the notes at foot hereof, shall be the basis of the contract between myself and the said society; and that if any fraudulent or untrue allegation be contained herein, or in the proposal, all moneys which shall have been paid on account of such assurance shall be forfeited to the said society, and the policy become void.

"And I further agree, that the first premium shall be paid *within* one calendar month after the date of this proposal, or that a new proposal, declaration and medical examination shall be furnished; and that the policy shall, under no circumstances, be in force until the actual payment, in my lifetime, of the premium, to an authorized agent or sub-agent of the society, within the time above prescribed.

"Dated at Washington City, this 5th day of April, 1850.

(Signed) DANIEL CAMPBELL.

"Witness—

"POLLARD WEBB, Agent."

"NOTES. 1. Whenever the annual premium is payable by installments, the society reserves to itself, in case of the death of the party assured, the right to retain, out of the amount payable under the policy, the balance unpaid of said annual premium.

"2. In all cases the first premium must be paid within one calendar month after the date of the proposal, or a new proposal, declaration and medical examination will be required; and agents and sub-agents have no authority to receive payment of premium after the expiration of the calendar month, or to bind the society by such receipt, without first transmitting a new medical examination of the party to the Society's chief office, in New York, and the risk being again formally approved of by the General Agent or Local Board of Directors, at New York. And the policy, under no circumstances, to be in force until the *actual payment* of premium to an accredited agent of the Society, within

the time above prescribed. But the Society in no case to be liable in the event of the death, within said calendar month, of the party on whose life the assurance is proposed, unless the premium has been actually paid in the lifetime of said party.

"3. In *all* cases a change of name in the life proposed must be stated.

"4. *The society grant* NO LOANS *to the assured, except when the insurance is effected on the withdrawal system. The premium must, in all cases, be paid annually, in advance, except when insurance is effected under the old system of tables, when it may be paid half yearly in advance.*

"5. If the proposed assurance be on joint lives or survivorships, the above particulars must be given with respect to *each* life, and must be signed by the parties whose lives are proposed to be assured."

Although the defendants are described in the case as a corporation, it was agreed that they are unincorporated.

M. V. B. Wilcoxson, for the plaintiff.

I. The thirtieth day on which the premium for the year commencing May 29th, 1857, was payable, by the statement in the note of the general agents of the defendants, and by the plain import of the words of the policy itself, fell upon Sunday, the 28th day of June, 1857.

II. The policy of insurance being for the term of life, and containing an agreement that the assured should be entitled to thirty days after the premium became due, to keep his assurance on foot and his policy in force, and the last of those thirty days having been a Sunday, the assured was entitled to pay the premium the following Monday. (*Lewis* v. *Burr*, 2 Caines' Cases in Er., 199; *Avery* v. *Stewart*, 2 Conn., p. 69; *Delamater* v. *Miller*, 1 Cow., 75; *Salter* v. *Burt*, 20 Wend., 205; *Staples* v. *Franklin Bank*, 1 Metc., 47; *Anonymous*, 2 Hill, 375; *Barret* v. *Allen*, 10 Ohio, 426; *Sands* v. *Lynn*, 18 Conn., 18; *Stebbins* v. *Leowolf*, 3 Cush., 137; *Hammond* v. *American Mutual Life Ins. Co.*, v. 10, No. 5, p. 275, Monthly Law R.; Chip. on Contracts, Supple. by Rat., § 16, p. 237.)

James. W. Gerard, for the defendants.

I. The policy, by its terms, covered a period from the 29th of May to the 28th of May for its original limitation, and for all extensions.

It therefore expired on the 28th of May in each year, and the thirty days (allowed as a privileged extension of time to renew) began to run from the time of its expiration.

Thirty full days from that date (the 28th May) would end on the 27th June, Saturday; and the assured not having renewed by that time, the policy became void.

II. If, as a construction of the condition, it be urged in behalf of plaintiff that the premium did not become due until the 29th of May, (the day after the policy expired,) and that, excluding that day, the thirty days would begin to run with the 30th, the answer to such a construction, is, that by condition 4, annexed to the application, which is expressly made a part of the policy, "the premium must in all cases be paid annually *in advance*," and consequently was payable on the 28th.

III. The contract between these parties being, as above stated, and as above construed, the thirty days for renewal would commence on the 29th May, and end on the 27th June following, a Saturday; and the premium not having been tendered till the succeeding Monday, the policy lapsed, unless the note of the agent, to the effect that the premium would be due on the 29th of May, is construed as a waiver of the defendants' rights to have their premium paid on Saturday.

It was not a waiver, because,

1. It was a mere gratuitous intimation or reminder from employees, and not a parol addition to the contract, and could not change the contract between the parties, which was plain and spoke for itself.

2. It was not a waiver of a forfeiture, because no forfeiture had then occurred. It was written in April, the forfeiture occurred June 27.

The dates and periods expressed, making part of the contract, cannot be altered or varied by parol or extrinsic evidence. (*Joseph* v. *Bigelow*, 4 Cush., 82; *Jackson* v. *Crysler*, 1 Johns. Cas., 125.)

IV. If the note of the agent is held to be a waiver of the time of premium being due, from the 28th to the 29th May, then

the thirty days should include and commence with the 29th, and thus would still have ended on Saturday. From the nature of the contract in suit, the first day is included, for the risk commences on the commencement of the 29th, in the morning.

In computing the time for the performance of contracts, Courts either include or exclude the first day of performance, as the propriety of the case seems to require, according to the context and subject matter and reason of the contract. (*R.* v. *Stevens*, 5 East., 244; *Pugh* v. *Leeds*, Cowp., 714; *Lester* v. *Garland*, 15 Ves., 248; *Glassington* v. *Rawlins*, 3 East., 407; *Presbrey* v. *Williams*, 15 Mass. R., 193.)

V. In any aspect, this note was nothing but a license or privilege. If by it the thirty days were extended from Saturday to Sunday, it can be so far construed and no further. It cannot be extended to Monday by implication, and must be strictly pursued as a condition precedent to entitle the party to its benefit. As the party has no right or contract under it, exact compliance must be shown.

All licenses are strictly construed. This license would be analogous to licenses in marine policies, which are strictly construed, and cannot be extended beyond the plain meaning of the words. (Arnould on Ins., Am. ed., vol. 1, pp. 394, 395 and 396.)

VI. If, under the contract of insurance or otherwise, the last of the thirty days for renewal expired on Sunday, the 28th, as claimed by plaintiff, a tender on Monday was insufficient. There was nothing to prevent a tender on the Sunday. The agent lived in the same town as the plaintiff. The act was a mere offer or tender, and not a contract, nor the performance of a contract, and as such, not interdicted by common or statute law from being performed on Sunday. It could not have been held invalid or illegal if performed on that day, nor could it have been objected to by us on that ground. (*Drury* v. *Defontaine*, 1 Taunt., 131; *Bloxsome* v. *Williams*, 3 Barn. & Cres., 232; *Scarf* v. *Magan*, 4 Mees. & W., 270; *King* v. *Inhab. of Whitnash*, 7 B. & C., 596; *Pearpoint* v. *Graham*, 4 Wash. C. C. R., 232; *Annis* v. *Kyle*, 2 Tenn. R., 31; *Story* v. *Elliot*, 8 Cow., 27; *Boynton* v. *Page*, 13 Wend., 425.)

VII. If, under any aspect, the Court should be of opinion that Sunday, the 28th of June, was numerically the last renewal day,

and that the renewal could not lawfully be made on that day; then the assured should have procured his renewal on the previous Saturday, and his tender on Monday was of no effect.

This unusual privilege to renew an expired policy within thirty days after its expiration, must logically be either,

1. A mere license or indulgence, for the benefit of careless policy holders, and not part of the contract; or,

2. A part of the contract.

If the former, viz., a mere license or indulgence, it cannot be extended by implication. A license to Sunday does not mean Monday. No Court has a right to extend it.

If the latter, viz., a part of the contract, then it was a condition precedent, and must have been strictly performed within the time. Precedent conditions must be literally performed, *i. e.*, to the letter. Here the right, *ipso facto*, ceased by the non-performance of the condition.

To extend the period to Monday would be to make a contract not contemplated by the parties. (4 Kent's Com., p 125, m. p.; Bacon's Abridg., Phil. ed., vol. 2, p. 292, and cases cited.)

Literal fulfillment of conditions precedent are essential to recovery on policies. They cannot be extended by implication, and nothing will excuse non-compliance. (Arnould on Insurance, vol. 1, p. 581 to 585.)

VIII. There could have been no surprise here, from the fact of the last day falling on Sunday.

It is not like a contract where the time from which the extension was to run, or the period of performance is uncertain.

The dates were fixed from the very first, and the assured could have calculated whether his last day fell on Sunday or any other day for fifty years ahead.

This case also differs from the case of *Salter* v. *Burt*, (20 Wend., 205,) and kindred cases, where the only day of performance is Sunday.

The following cases show that where the last day of performance is Sunday, the party must perform on the previous Saturday. (*Kilgour* v. *Giles*, 6 Gill & Johns., 268; *Pearpoint* v. *Graham*, 4 Wash. C. C. R., 232; *Annis* v. *Kyle*, 2 Tenn. R., 31; *Alderman* v. *Phelps*, 15 Mass., 225.)

Judgment should be rendered for defendants on the case presented.

By the Court—Hoffman, J. The question is, whether the tender of the premium on the 29th of June, 1856, being Monday, was sufficient to keep the policy in force. That question will be first considered, upon the terms of the policy merely, irrespective of the letter of the agent and other facts.

1. By one clause of the policy, it is provided that the yearly premium for such assurance is $65.40, and that the said Daniel Campbell hath paid the sum of $65.40, being the annual premium for such insurance, to wit, for the term of twelve months, ending the 28th day of May, 1851.

In the margin of the policy are these words: "Risk commencing 29th of May, 1850, ending 28th of May, 1851."

Thus twelve months is computed as beginning on the 29th, and terminating with the end of the 28th of May.

Treating, then, the time for payment of the premium as exactly commensurate with the duration of the risk, if a premium was paid on the 29th, the risk endured until the last moment of mid night of the 28th of the same month, in the ensuing year, and the new premium ought to be paid before the end of the last moment of the 28th.

But then is added this provision: "The policy will not be considered in force, if the premium remains unpaid beyond thirty days after becoming due." We may properly say conversely, that the policy shall remain in force, if the premium is paid within thirty days after becoming due.

Upon these terms used by the parties, the premium undoubtedly became due at the endof the 28th of May. The first day of the thirty days for making the payment commenced with the first moment of the 29th of May, and ended with the last moment of the 27th of June. In the year 1857, this fell on Saturday; and in this view, the full thirty days allowed for the payment expired with the end of Saturday. That was the last day for performance of the engagement, and the tender on Monday could not be good.

This computation, it will be noticed, includes both the 29th of May and the 27th of June. The day when the premium became due was the 28th of May, and that is excluded. There is no rule which would also exclude the 27th of June.

The Revised Statutes (1 R. S., 606,) provide for the computation of time; and it is observed by the court in *Pulling* v. *The People*, (8 Barb. R., 384,) that according to this division of time, a day consists of twenty-four hours, and commences and ends at midnight.

This, then, is an adoption of the natural day, as distinguished from the artificial day from sunrise to sunset. (Id.) The first day of any number of days for doing an act, would not expire until the lapse of twenty-four hours from any moment, even the first second of that day. It would expire on the corresponding moment of the second day. This seems to produce the same result as the rule of excluding the first day in computing the time for doing an act.

The Code (§ 407) directs that the time within which any act is to be done, within its provisions, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded. It has, therefore, furnished a definite rule for all cases within its own provisions.

There is no way of regarding the question, if we treat the premium to have been due on the 28th of May, which will not make the thirty days end on Saturday, the 27th of June.

2d. We are then to consider the point, whether there is not enough in the case to warrant the conclusion that the 29th of May was, by consent, the true day for payment of the premium.

The policy was dated the 29th of May. The first premium was paid on the 31st of that month, and the premium was paid annually in advance up to the 29th of May, 1857. The general agents informed the party that the premium would be payable on the 29th of May, by the note stated in the case. This note appears to have been conformable to the understanding and practice of the parties.

Again, the note of the general agents was sufficient to justify the assured in treating the 29th as the time when the premium was payable. It was their construction of the effect of the agreement, or of the habit under it, if it was not fully within their authority to vary the day. It justified the party in relying upon that representation, coming from those who were entitled to make a contract of insurance, and acting as the general agents in the United States.

Starr, as general agent, possessed the power of binding the association to an insurance. Whether a full policy was obtained within three months or not, his contract was sufficient.

In *Wing* v. *Harvey*, (27 Eng. & Eq. L., 140,) an agent of a company received a premium, knowing that the condition of a life policy had been broken. His knowledge was held to be constructive notice to the company of the breach, and acceptance of the premium was a waiver of the forfeiture.

Leeds v. *The Mechanics' Insurance Company*, (4 Seld., 351,) is a case which, I think, supports this view of the power of the general agents in this instance.

See, also, *Brocklebank* v. *Sugrue*, (5 Carr. and Payne, 21,) *New York Central Insurance Company* v. *The National Prot. Insurance Company*. (20 Barb., 468.)

I think we are justified in saying that the 29th of May was the true day for payment of the premium in 1857.

If this conclusion is right, the next inquiry is, can the 29th of May be excluded from the computation of the thirty days? If it may be, then the thirty days expired on Sunday, the 28th of June; and the remaining question will be, had the assured the ensuing Monday on which to pay the premium?

Besides the rule given in the Revised Statutes of 1830, construed as before stated, I think that the cases of *Wiggin* v. *Peters*, (1 Metc., 127,) *Bigelow* v. *Willson*, (1 Pick., 485,) *Sands* v. *Lyon* (18 Conn., 18,) *Lester* v. *Garland*, (15 Ves., 243,) and of *Dowly* v. *Foxall*, (1 Ball & Beatty, 193,) with the authorities there cited, are decisive to sustain an answer in the affirmative to the first question. The Court, in the case from Connecticut reports, justly commends the opinion of Sir WILLIAM GRANT, in *Lester* v. *Garland*, as the most instructive and able of any to be found in the books. That eminent judge says "that it would be more easy to maintain, as the general rule, that the day of an act done, or an event happening, ought, in all cases to be excluded, than any other rule." In other authorities, this general rule is made applicable to the case of an obligation arising on a particular day, and its performance extended from that day.

So the Court in Massachusetts observe: "we are warranted in saying, that when time is to be computed from or after the day of a given date, that day is to be excluded in the computation. No

moment of time can be said to be after a given day until that day has expired."

The contract, as we now analyze and construe it, was, that the policy should cease to be in force if the premium remained unpaid beyond thirty days after the 29th of May.

3d. Then arises the important question. As by this mode of computation the last day of the thirty days was Sunday, could the tender of the premium be made on Monday?

The argument which is used to prove that it cannot be, is substantially this: 1st. Whatever may be lawfully done on any other day of the week, may be done on Sunday, except so far as positive statutory regulations have prohibited a particular act. And next: What is so permitted to be done on Sunday, must be done on that day whenever, under a contract, the day for fulfillment falls upon it, or else it must be done before that day. I state this to be the substance of the argument as a general proposition; not that it is contended that such a rule is absolutely exceptionless.

These important and interesting propositions may well warrant a careful examination.

In support of this view, my brother PIERREPONT (who does not concur with the court) has referred to the opinion of Lord MANSFIELD, in *Swann* v. *Broome*. (3 Burr., 1596.) That great judge cited Sir HENRY SPELMAN'S (Original of the Terms) to show "that the Christians used all days for the hearing of causes, not sparing (as it seemeth) the Sunday itself." He assigns as one reason of this, that by keeping their courts always open, suitors would be prevented from resorting to the heathen tribunals.

He cites also a canon of the year 517, forbidding any Bishop or any one under him, from judging causes on the Lord's Day, and traces the regulation through other canons, until it became incorporated into the body of the canon law in the Code of Gratian. He states further, that it became part of the common law of England, by its confirmation by William the Conqueror and Henry the Second.

If such a practice existed, it was, as I shall clearly show, checked at a far earlier period than the year 517; and it seems to me there exists a much more satisfactory and probable reason for its prevalence for a short period, than the one assigned.

There was an apostolic injunction that the controversies between the faithful should be left to the decision of some among themselves, and should not be brought before the tribunals of the heathen. (1 Cor. vi, 1–7.) The rule of judgment was to be one of persuasion, charity and forbearance; and it may well have been thought, that the holy day was not desecrated when litigants were brought to reconciliation or atonement by influences like these.

It is obvious that a scriptural custom, so benign in the early days of Christianity, could not remain without danger and inconvenience, when the ecclesiastical tribunals had nearly superseded the secular courts; and, as we may justly infer, the superior purity of the principles of the decisions, and the higher learning and equity of the administrators, made the people sustain and court them. (See *Van Espen Jus. Eccl. Univ., p.* 730–733, XXVIII.)

The canon of A. D., 517, referred to by Lord MANSFIELD, was not the earliest law upon this subject. Constantine the Great passed an edict, the date of which I have not ascertained, but it was between the year 306, the time of his conversion, and 331, that of his death. It may be thus translated: "Let all judges, and the inhabitants of cities, and the labors of all trades and arts, rest on the venerable day of the Sun." [1]

So, in an edict of Valentinian the younger, between A. D. 375 and 392, we find, "On the day of the Sun, which our forefathers rightly called the Lord's Day, let attention to all litigations, to all employments, and to all agreements, utterly cease; let no one demand either a public or a private debt; nor let cognizance be had of any disputes before those who are to determine, whether appointed by law or voluntarily chosen. [2]

The translation I have given differs from that of the learned Bingham. (Antiquities of the Christian Church, Book XX, ch.

[1] "Omnes judices urbanæque plebes, et cunctarum artium officia, venerabile die solis quiescant." (Code of Justinian *de Feriis, lib. III, tit.* 12–3; *Van Espen jus Ecclesiasticum Universum, p.* 486.)

[2] *Solis die quem Dominicum rite dixere majores, omnium ommnino litium negotiorum, conventionum, quiescat intentio; debitum publicum privatumve nullus flagitet; ne apud ipsos quidem arbitros vel in judiciis flagitatos, vel sponte dilectos ulla sit agnitio jurgiorum.*

2, § 2.) For one important word, *conventionum*, translated, "agreements," I have the authority of Ulpian. (*Digest, lib.* 2, *tit.* 14, *L.* 1.) It is a general word relating to all things, in respect to which parties come together for contracting or transacting any business. See, the passage, also, in the Dictionary of Forcellini *ex cura Facciolati, in verbo.*

The Day of the Sun, *Dies Solis*, was used at a very early period as synonymous with *Dies Dominicus*, the Lord's Day. It is spoken of by Justin Martyr, A. D. 140–148, as the Day of the Assemblage of Christians, and the Day of the Resurrection. *Diem Dominicum* is the phrase of Tertullian, before A. D. 218, and of Ignatius, before 107, whose acts are traced to the year 70. A late writer says: "It was sometimes called Sunday, *Dies Solis*, in compliance with the common phraseology, and when it was necessary to distinguish it in addressing the heathen." (Riddle's Christian Antiquities, p. 649–651; Pearson on the Creed, 391, *n.*)

In the beginning of the Diocletian persecution, (A. D. 303,) the magistrate asked, "Have you kept the Lord's Day?" to which the Christian answered, "I cannot intermit it, because I am a Christian." (Act. Martyr Barronius Ann., 303, *n.* 37.)

The 20th canon of the Council of Nice (A. D. 325) uses the Greek word, which is uniformly translated *Dominicum* or Lord's Day, designating the day of the resurrection. The 29th canon of Laodicea (A. D. 305) provides "that Christians must not Judaize and rest on the Sabbath Day; but work on that day, and honor the Lord's Day; and if they can, rest upon it as Christians."

I cannot but add, that the argument of Bishop Pearson, as to the day of the resurrection—the principal texts he cites (St. Mark, xvi, 2; St. Matthew, xxviii, 1; St. Luke, xxiv, 1; and St. John, xxi,) with the phrase, the Lord's Day, used in Scripture (Rev. i, 10,)—the practice of assembling there recorded (1 Cor. xvi, 2), and the usage of Christians traced back to such remote antiquity, constitute an argument of irresistible force, to prove that the Jewish Sabbath was superseded; that the day of the resurrection was substituted, and that the great injunction of the ancient law to keep it holy, was applicable to this new day of a greater deliverance. Ecclesiastical history is uniform to show that its observance as a rule for all who profess themselves Christians,

has been recognized and transmitted by the practice of apostles, the obedience of disciples, the recognition of canons, and the edicts of emperors, monarchs and states, from the earliest rise of Christianity through all the ages of its progress.

It would not be pertinent to pursue this inquiry further, except to remark, that in the early edicts, personal labor, and especially the labor of the field, seem to have been treated as less the objects of prohibition than in later days, when they have been chiefly aimed at. (*Van Espen, ut supra.*)

Coming down to the law of our English progenitors I cannot but dwell for a moment upon the rules laid down in the *Liber Penitentialis* of Theodore, Archbishop of Canterbury, between the years 668 and 690. (Ancient Laws and Institutes of England, published by the Record Commission of 1840, p. 298, XXXVIII, 6, 14.) It made a part of the general law of England, and was full, minute and comprehensive in its prohibitions.

Even before this, in the year 547, a Saxon King, Ida, had declared that the slave who was compelled to work on the Lord's Day should be freed by his master.

So Lynwood, in his Provincial Constitutions, (p. 57, *Canonicis Institutis*,) states the law thus: *Abstinendum est ab operis mechanicis, ab agricultura; a mercatis, et a placitis; et hoc verum nisi quando contrarium exegit necessitas vel pietas.*

One of the earliest statutes of England was that of the 27th Henry VI, (ch. 5.) Persons were commanded, at all fairs and markets to cease from showing goods on Sundays. The statute (5 and 6 Edw. VI, ch. 3,) recites in its impressive language, that "to call men to remembrance of their duty, and to help their infirmity, it hath been wholesomely provided, that there should be some certain times and days appointed wherein the Christian should cease from all other kinds of labors, and should apply himself only unto the holy works properly pertaining unto true religion;" and after various enactments as to the days to be kept holy, and other matters, provides, in the 7th section, that it should be lawful for every person in harvest, or at any other time in the year when necessity shall require, to labor or work any kind of work on such days.

The act of 1st Car. I, ch. 1, prohibited assemblages of people out of their parishes on that day. That of the 3d Car. I, ch. 1,

forbade carriers and waggoners from traveling on the Lord's Day, and butchers from killing; and the statute of the 29th of Car. II, ch. 27, in force to this day, provided, "that no tradesman, artificer, workman, laborer, or other person whatsoever, should do or exercise any worldly labor, business or work of their ordinary calling, upon the Lord's Day, or any part thereof, works of necessity or charity only excepted, and no person shall publicly cry, show forth, or expose to sale, any wares, merchandise, &c., upon pain of forfeiture thereof."

In our own legislation on this subject, it is to be noticed that the present statute, (1 R. S., 675, § 59,) omits the enumeration of persons, tradesmen, workmen, or other persons whatsoever, as well as the words "of their ordinary calling." It is as follows, "Nor shall there be any servile labor or working on that day except works of necessity or charity, or unless done by some person who uniformly keeps the last day of the week called Saturday as holy time, and does not labor or work on that day, and whose labor shall not disturb other persons in the observance of the first day of the week as holy time."

I consider that this provision treats "servile labor" as one distinct class of what is forbidden, and "working," without the adjective, as another; that it has adopted the latter phrase as the most comprehensive that the language can supply to cover the action and employment of mind or body in the pursuits of business. It explicitly recognizes the first day of the week as "holy time." And thus it has brought us back to the full, enlarged and absolute rule of interdiction, which we find prevailed in the earliest laws of Christian states, and which, as I shall show, the construction of the statute of Charles II has tended somewhat to narrow and impair.

Among the English authorities, *Bloxsome* v. *Williams*, (3 Barn. & Cress., 232,) is frequently cited, as well as *Drury* v. *Delafontaine*. (1 Taun., 131.) It was held in one of them that the sale of a horse on Sunday, by private contract, the ordinary calling being to sell horses at auction, was not within the statute. But in *Fennell* v. *Ridler*, (5 Barn. & Cress., 406,) Justice BAILEY, who in *Bloxsome* v. *Williams* doubted whether the statute applied to private sales, observed, that such doubt was removed. "Labor may be private and not meet the public eye, and so not offend

against public decency, but it is equally labor, and equally interferes with a man's religious duties." He adds, that in truth the contract in *Bloxsome* v. *Williams* was made on Tuesday. In the principal case, a sale of a horse, by a horse dealer, privately made on Sunday, was held void.

In *The King* v. *The Inhabitants of Whitnash*, it was decided that if a sale or a contract is not in the line of a man's ordinary calling, it is not within the prohibition of the statute. (7 Barn. & Cress., 596.)

Our own statute has received a construction in the following cases: *Story* v. *Elliott*, (8 Cow., 27,) *Sayles* v. *Smith*, (12 Wend., 57,) *Boynton* v. *Page*, (13 id., 425,) *Watts* v. *Van Ness*, (1 Hill, 76,) *Delamater* v. *Miller*, (1 Cow., 75,) *Bissell* v. *Bissell*, (11 Barb., 96,) *ex parte Dodge*. (7 Cow., 147.)

In *Delamater* v. *Miller*, upon an agreement to keep and deliver a watch, the promisor was held not bound to regard a demand made on Sunday. *Story* v. *Elliott* was the case of an award made on Sunday, and held void. *Swann* v. *Broome*, before Lord MANSFIELD, is stated at length. The opinion contains the proposition, that acts not prohibited, may lawfully be done on Sunday.

In *Sayles* v. *Smith* it was decided that a statutory foreclosure was not void, because the day for the sale specified in the advertisement fell on Sunday. A postponement to a subsequent day was held valid. It is queried whether a sale on that day could have been good. Again the doctrine is stated, that what is not forbidden by statute may legally be done.

In *Boynton* v. *Page* it was determined that a private transfer of personal property made on Sunday was valid, and the distinction before noticed in some of the English cases was approved and acted upon, that there was no violation of the public order and solemnity of the day.

Watts v. *Van Ness* was the case of an attorney's clerk, engaged at a weekly salary, doing extra work on Sunday, similar to that of his ordinary calling. It was held that he could not recover.

Bissell v. *Bissell* and *ex parte Dodge* were decided upon the ground that, in the construction of statutes of our State, if the last day for doing the act falls on Sunday, it must be done on the preceding day. Judgment, therefore, which must be rendered

dered by a Justice within four days after the submission of the cause, could not be entered on Monday, the fourth day being Sunday, but must be on Saturday. And so in the case of an appeal, the period being limited by statute.

Yielding to the force of what has been actually decided, we cannot but notice a marked line of distinction between what is suffered being not positively prohibited, and what is allowed to be omitted and deferred, because at variance with the principles and law of Scripture, because as much within the object of the statute, "the observance of Sunday," as anything expressly prohibited, and because in some cases it is clear, and in others may be inferred that contracts are made into which the law imports the qualification, and the parties are treated as entering into them with that in view, that if the day of performance is Sunday, it may be done on some other day. We shall endeavor to see if such a principle, applicable to the present case, can be deduced from the authorities.

It is a settled doctrine of mercantile law, that a promissory note or bill must be demanded on the third day of grace, unless that falls on Sunday, and then upon the second day, or Saturday. (*Bussard* v. *Levering*, 6 Wheat., 102; *Jackson* v. *Richards*, 2 Caines, 342; *Johnson* v. *Mathews*, 13 John. R., 470.) But if a check or note is without grace, and it falls due on Sunday, the party has Monday to make payment. (*Salter* v. *Bart*, 20 Wend., 205.)

The usage in regard to the days of grace is as old as the time of Lord HOLT. (2 Caines, 344.) The contract, by such usage, so established as to be part of it, is to be fulfilled on a given day, which falls upon Sunday. The law interposes and says that it cannot be, or at least need not be performed on that day. It shortens the time of performance, and not merely requires payment on Saturday, but sustains notice of protest given on Monday. (2 Caines, 344; *Cuyler* v. *Stevens*, 4 Wend., 566.) "By general or universal custom, Sunday is not a day of business." (See, also, *Howard* v. *Ives*, 1 Hill, 263.)

For a long time the Courts held, and finally embodied the decision in general rules or orders, that in all matters of practice, when a time was fixed for performance of an act, or the giving of a notice, and the time expired on Sunday, it could be done

on the ensuing Monday. (*Cock v. Bunn*, 6 Johns. R., 326; *Broome* v. *Wellington*, 1 Sandf. S. Ct. R., 664; *Bissell* v. *Bissell*, 11 Barb. R., 96.)

The rule was stated in unqualified language by Justice BRONSON in *Salter* v. *Burt*. (20 Wend., 205.) "I agree to the doctrine laid down by GOULD, J.," (in *Avery* v. *Stewart*, 2 Conn. R., 69,) "that Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and it should for that purpose be considered as struck from the calendar. In computing the time mentioned in a contract for doing an act, intervening Sundays are to be counted; but when the day of performance falls on Sunday, it is not to be taken into the computation."

In *Avery* v. *Stewart*, (2 Conn. R., 69,) the Court (six Judges to three) held that when a contract was to be performed on a particular day of a month in future, and that happened to be Sunday, it was to be performed on the following day. The action was on a note not negotiable, payable in sixty days from date, in cotton yarn, to be delivered at a certain place. It was dated the 6th of December, 1816, and fell due the 4th of February, which was Sunday. On Monday, what was equivalent to a tender of the yarn was made. The debtor could not be required to pay, nor the creditor to accept payment before the time appointed.

The case of *Sands* v. *Lyon*, (18 Conn. R., 18,) is an authority which covers the point fully and decisively. A testator devised lands to his son, on condition that he should pay A. $100 in one year after his decease. He died on the 2d day of October, 1841. The 2d day of October, 1842, fell on Sunday. A tender on the ensuing Monday was held good. The day of the death was to be excluded from the computation. By doing so, the day of the expiration of the year would be Sunday. The defendant had a full year allowed him for paying the money, and was not bound to pay it on the Saturday preceding the day on which the year expired.

It appears to me, from this review of the law, that the Court is warranted in saying that when, from accident or mutual error, the day of fulfilling an agreement falls upon Sunday, there is enough of principle and authority to justify the party in deferring

his performance to the Monday ensuing, without impairing a right, or incurring a forfeiture.

The judgment must be for the plaintiff.

PIERREPONT, J., dissented.

Judgment for plaintiff.

JAMES W. ELWELL and others, Plaintiffs and Appellants, *v.* MOSES CHAMBERLAIN, Defendant and Respondent.

1. A lender cannot avoid his own contract on the ground that it contains a usurious reservation in his own favor.
2. A sale of a note valid in the hands of the vendor may be made for any price the vendor chooses to accept therefor, and it is not usury.
3. Where a party being applied to by a broker to purchase a note having about three months to run, (which the maker has placed in the broker's hands to raise money,) and not being willing to purchase the note, consents in good faith to exchange his own note for it, and receive a compensation of two and one-half per cent for such advance or sale of his credit, the transaction is (according to the weight of authority in New York) not usurious *per se.* Such a transaction may be usurious when it is resorted to as a cover for usury; but where the honest intent and meaning of the transaction is to give to another the use of one's credit for a compensation, it is lawful. (PIERREPONT, J., dissented.)
4. On a sale of a promissory note, both parties dealing in good faith, and negotiating openly, one offering and the other requiring a discount, in view of the very risk of payment involved in the transaction, after the note has been delivered and accepted and the purchaser has given his check for the agreed price, the purchaser cannot stop payment of his check and resist its payment on the mere ground that the makers of the note had stopped payment before the sale. Such circumstances do not amount to a failure of the consideration of the check. (PIERREPONT, J., dissented.)
5. When a broker, who is employed by the plaintiff to sell a note, is guilty of a false and fraudulent representation, upon faith whereof the defendant buys the note, the defendant may rescind the contract and return the note, and refuse payment of his check given for the price. The plaintiff, seeking to enforce a contract made by his agent, is affected by the agent's fraud,

although he never authorized the false representation, nor knew that it was made down to the time of the trial.

6. But to entitle a party to rescind a contract on the ground of such fraudulent representation, it must appear not only that it was material and untrue but that he acted on the faith thereof; which imports not merely that he believed the fact to be as it was represented to be, but that such belief was founded on the representation.

7. When there is a conflict of testimony in regard to the question whether the representation was made, or whether the fact reported was true, or whether the defendant acted in reliance on the representation, or sought and acted on other information, it is error to direct the jury to find for the defendant. Such a direction is not proper, unless the case be such, upon the pleadings and proofs, that a verdict of the jury for the plaintiff would be set aside as against law or against evidence.

(Before Slosson, Woodruff and Pierrepont, J. J.)

Heard, October 5, 1858; decided, March 12, 1859.

This action was brought against the defendant as drawer of a bank check for $2,215.20, dated October 14th, 1856, drawn on the Nassau Bank, payable to the order of C. N. Mills, and by him indorsed to the plaintiffs; payment whereof was duly demanded, and being refused, the defendant had notice thereof.

The answer sets up, by way of defense, that on and before the 13th day of October, 1856, the defendant held and owned a promissory note made by the firm of Lane, West & Co., which was payable on the said 18th day of October, 1856, and which had been placed in the Central Bank of Brooklyn, for collection; that before the said note became due, the plaintiffs having in their hands another note for $2,240.20, due October 23, 1856, made by Lane, West & Co., employed a broker to sell it for them; that such broker placed it in the hands of another broker, C. N. Mills, to sell for the plaintiffs; that Mills applied to the defendant to purchase the note, and that the defendant refused to buy it until the first named note already held by him should be paid; that on the 14th day of October, Mills stated to the defendant that such first named note had been paid, and thereupon the defendant, not knowing whether such first named note had been paid or not, but relying solely on the statement of Mills, purchased from Mills the note which he offered for sale, for the price of $2.215.20, and gave him the bank check in question, which check Mills indorsed to the plaintiffs; that Mills

acted as the plaintiffs' agent; that the said first named note had not been paid, and that Mills' statement was entirely untrue; that Lane, West & Co. failed on the 9th of October, of which the defendant was ignorant. The answer then further alleges that the note of Lane, West & Co., so sold by Mills to the defendant, was made by them for the purpose of being sold in the market to raise money, and for no other cause or consideration; and that the same came into the hands of the plaintiffs "without any legal consideration paid therefor whatever;" and that the plaintiffs, through the same brokers, sold it to the defendant under an illegal and usurious agreement, by which the defendant deducted therefrom a sum greater than the legal discount for the time the note had to run, viz.: $25 for nine days, and gave the check in question for the balance.

The action was tried in January, 1857, and on that trial the defendant gave evidence tending to prove that he was, on the 14th day of October, 1856, induced to purchase the note for which the check was given by the unqualified representation of C. N. Mills, that the note of Lane, West & Co., due the previous day, was paid, and that the purchase was made in sole reliance upon the truth of that representation, as distinctly understood between the defendant and Mills at the time. That the check in question was given upon that purchase, and that the representation of Mills was untrue, and the note in truth was not paid, but was protested for non-payment. That Mills was expressly informed that the defendant would not become the purchaser of another note of Lane, West & Co., while holding the first note unpaid, and that the negotiation and purchase proceeded upon that understanding.

On that trial, however, the jury were instructed peremptorily to find a verdict for the plaintiff.

The General Term, on appeal from the judgment, ordered a new trial on the ground that Mills, although not directly employed by the plaintiffs to make the sale, was their agent therein. That they could not insist upon the sale made by him, and claim the benefit thereof without being affected by his misrepresentations. That if the sale was made and the check in question was procured by Mills from the defendant by such misrepresentation, the defendant acting in known reliance upon the truth of what Mills stated

it was erroneous to charge the jury that the plaintiffs were entitled to recover. 2 Bosw. 230.

The action was again brought to trial on the 20th of May, 1858, before Mr. Justice PIERREPONT and a jury.

On this second trial, the testimony of the defendant was the same as on the first, viz.: That Mills offered the note of Lane, West & Co., to the defendant, a few days prior to the 13th of October, and defendant told him he already had as much of Lane, West & Co.'s paper as he wanted; that defendant then had a note made by them for the same amount, due on the 13th, in a bank in Brooklyn, and if that was paid at maturity defendant would then buy the note in question. That Mills called again on the 14th of October, and said: "Your note is paid; Lane, West & Co., paid it yesterday; now, according to your promise, you must buy this note." That defendant replied: "I do not know whether my note is paid or not; but if you say it is paid, I will take your word for it and buy your note." Mr. Mills rejoined, "it is paid;" and that accordingly he (the defendant) took the note, deducting $25 from the face of the note, and gave the check in question for the consideration money. That he learned the next morning, by notice of protest received through the mail, that the note in the Brooklyn Bank was not paid, and he then stopped the payment of his check and sent the note back to Mills.

Mills, on the other hand, testified that on the morning of the 14th, he had heard from a third person that the note of Lane, West & Co., due the previous day, had been paid, and supposed it was so; and that he told the defendant that it was paid. That the defendant would not then buy the note, but said that he had received no news of that note, and then said that he would not take the note offered by Mills. That just before three o'clock in the afternoon, he met him near the steps of his office; that defendant was coming from the north and said, "I believe that note is paid, and I have made up my mind to buy this." That they then went up stairs and defendant gave Mills the check. That at that time he (Mills) did not tell the defendant that the other note was paid.

This testimony of Mills is in some degree corroborated by that of the plaintiff, who testified that he asked the defendant, on the 15th, why payment of the check was stopped? "He said he had received a notice of protest of a note of Lane, West & Co.,

which he had deposited in the Nassau Bank, which bank kept an account with the Central Bank of Brooklyn, where the note was payable. He said he had presumed the note was paid, for that up to three o'clock on the 14th, on going to the Nassau Bank, they had told him they presumed it was paid as they had received no notice of protest. He did not say anything about Mills having assured him that the note was paid."

"I think he said he went to the bank; he said they told him that if the note was not paid they should have received notice of protest before three o'clock." * * * * "He said, up to three o'clock of the day before, they had received no notice of protest at the Nassau Bank, and he had presumed *from that* the note was paid."

It was also proved that a note of Lane, West & Co., was protested on the 6th of October, through an oversight; that they paid some $60,000 between the 9th and 13th, and that the 13th was the last day on which they paid; and that they stopped paying notes on the 13th of October, and made an assignment on the 17th; but that they could have obtained $20,000 on their credit on the 15th without difficulty.

In relation to the plaintiffs' title to the note so sold to the defendant, it was testified that it was made by Lane, West & Co., payable to their own order, and placed in the hands of a broker, "to be sold in the market." That their broker delivered it to another who testified, "I exchanged that note with the plaintiffs for their note for the same amount; I allowed them two and a half per cent on the face of it on the exchange." This was in July, 1856; that the plaintiffs' note was paid; that two and a half per cent is a customary charge for such a transaction; and the plaintiff testified, "Hotchkiss" (the broker) "came to me and wanted me to buy the note; not having the money I declined; he proposed that we should give him our credit for it; I told him when we sold our credit we charged two and half per cent; he said I might have it at that, and he gave me a check for that amount."

The Judge thereupon directed the jury to find a verdict for the defendant, and the plaintiffs' counsel excepted.

From the judgment entered upon the verdict rendered for the defendant under this direction the plaintiffs appeal to the General Term.

E. C. Benedict, for the plaintiffs (appellants).

I. This transaction was in perfect good faith in all parties. There is no ground for even a suspicion of fraud.

II. Elwell gave value for the note when he gave for it his own note of equal amount.

Elwell gave value for the check when he gave the note of Lane, West & Co. for it. That note was not valueless. The nature of the transaction shows that there was no warranty.

He was a *bona fide* holder for value, in both cases, without notice of any defense.

III. The previous conversation between Mills and defendant, about a previous note of Lane, West & Co., did not affect the plaintiff.

1. Mills was not the agent of plaintiff, in that conversation.

2. The plaintiff expressly refused then to take the note, till he should be satisfied by his own inquiries. He purchased on his own information.

IV. Lane, West & Co. were in good credit at the time, nor had any of the parties any suspicion of a failure.

V. If the proof is not clear that the transaction was fair; that the defendant in fact took the risk of the note being paid; that Mills did not, at the time of selling the note, make any representations as to payment of the previous note; that Mills was not the agent of the plaintiff, then the Court should have allowed the case to go to the jury.

Wm. M. Allen for the defendant (respondent).

I. The purchase of the note for which the check was given, was on condition, and the condition having failed, a recovery could not be had, and Mills making a false representation to obtain the check, no action will lie; fraud vitiates everything.

See the opinion of the Court in this case. (2 Bosw., 230.)

II. The plaintiffs, having adopted the acts of Mills, are responsible for all he did. (Story on Agency, §§ 249, 250.)

III. The makers of the note having failed at the time, is a good defense. *Ontario Bank* v. *Lightbody*, (13 Wend., 101,) *Colville* v. *Besly*. (2 Denio, 139.)

BY THE COURT—WOODRUFF, J. The defense set up in this action embraces four grounds upon which the defendant insists that he is not liable upon the check in controversy, which, though not separately stated as distinct defenses, as required by section 150 of the Code, are found in facts which are averred in the answer.

1st. That the check was obtained from the defendant by representations made to him by the plaintiffs' agent, which representations were of a material fact, known to the agent to form an inducement to the giving of the check, and which were relied upon by the defendant, but which representations were false.

2d. That the sole consideration of the check was the sale to the defendant of a promissory note of Lane, West & Co., and that that firm had failed when the sale was made, and so the defendant had a right to rescind the contract, return the note and refuse to pay the check.

3d. That the plaintiffs paid "no legal consideration for the note so sold," which averment the defendant now claims to have been sufficiently established by the evidence that the note was made by Lane, West & Co., to be sold in the market, and the plaintiffs received the note in exchange for their own note and received two and a half per cent for making the exchange, and the defendant claims that this rendered the note usurious in the plaintiffs' hands and void, and therefore that the defendant could not recover thereon, and so the consideration for the check has failed, or that in truth there was no legal consideration for the check.

And 4th. That the defendant having himself bought the note at a discount greater than the lawful discount at 7 per cent, the transaction between him and the plaintiffs was void by reason of the usury which the defendant reserved, and he may repudiate the transaction on that ground.

If either of these defenses is sufficient in law, and the facts constituting such defense are either admitted or are clearly proved without contradiction, then the direction to the jury was proper; there was nothing in dispute which ought to have been submitted to the jury in any other form.

On the other hand, if these defenses are insufficient in law, or the state of the proofs was such that the Court could not properly hold as matter of law that a defense was established, then so far

as material facts were in dispute the case should have been submitted to the jury under appropriate instructions. Unless the pleadings and proofs presented such a case that a verdict for the plaintiffs would have been against law or against evidence a peremptory instruction to find a verdict for the defendant was not warranted.

To consider, then, the grounds of defense relied upon, reversing the order of the foregoing statement,

1. It is insisted that the defendant having purchased the note of Lane, West & Co., from the plaintiffs, at a greater discount than the legal rate for the time it had to run, is not bound to pay the check given for the consideration of that purchase. This assumes that the transaction between Mills (the broker) and the defendant was usurious, and that the transaction between them was in substance a loan by the defendant upon usury. And it argues that the lender upon usury may avoid the contract on the ground of his own reservation to himself of more than legal interest.

This is a novel view of the design and effect of the laws against usury. They have heretofore been regarded as designed for the protection of borrowers only, and so far as they are punitive in their nature are said to be intended to punish the usurious lender. We think he cannot allege his own violation of the statute as a reason for not paying his check. (*La Farge* v. *Herter et al.*, 5 Seld., 241.)

Again, as between the defendant and the plaintiffs, (or Mills, the agent,) if the note was a valid note in the hands of the plaintiffs there was no usury. Ever since the final decision in *Cram* v. *Hendricks*, (7 Wend., 569,) it is settled in this State, that the holder of a promissory note which is valid in his hands may sell it for any price he thinks proper; and where, as in the present case, the vendor does not indorse the note, it was not before that time, doubtful that the transaction was perfectly valid. A promissory note is as much the subject of sale as any other species of property. (3 Wend., 62; 8 Cow., 685; 15 J. R., 44, and cases cited in the notes to the 2d ed.)

Whether the note sold to the defendant was or was not valid in the hands of the plaintiffs will be presently considered. That is the subject of another ground of defense, viz., failure of con-

sideration. But in regard to the claim that there was usury between the defendant and the plaintiffs, it must suffice to say: that the defendant cannot set up his own usurious reservation as a defense; that if the note was valid in the hands of the plaintiffs, there was no usurious reservation; and if the note was void in the plaintiffs' hands so that they could convey no title, that amounted to a failure of consideration, and we will inquire into it when we discuss that point, which is next in order, viz.:

2. It is averred in the answer that the note which was sold to the defendant "came into the hands of the plaintiffs without any legal consideration paid therefor, whatever." Under this averment the defendant claims that he may properly insist that the plaintiffs received the note from the makers upon a usurious contract with them, and so acquired no legal title. It requires very great liberality in the construction of the pleadings to warrant such a defense under such an averment. We have, however, considered the question so raised upon the merits as if the averment were sufficient to raise the question. The note, for which the check, now in suit, was given, was made by Lane, West & Co., for sale in the market to raise money for their use. It was placed in a broker's hands to be sold. He took it to the plaintiffs, in July, before its maturity, and the plaintiffs declined purchasing it. But after some negotiation the plaintiffs consented, as the broker testifies, to exchange their note, for the same amount, for the note referred to, the broker allowing them two and a half per cent on the face of it on the exchange. The testimony of one of the plaintiffs, is, that after he had declined buying it, the broker proposed that the plaintiffs should give him their credit for it, and being told that when they sold their credit they charged two and a half per cent, the broker assented and paid the two and a half per cent for the exchange of notes.

Where a transaction is in substance a loan of money, goods or things in action, a reservation of a greater sum than the legal discount makes the transaction void, whatever device is adopted to conceal its true nature, or by whatever form the object is accomplished.

Two and one-half per cent, deducted in July, from the face of a note, which was payable in October, is a greater deduction than after the rate of seven per cent per annum.

It was held in *Dunham* v. *Dey*, (13 J. R., 40,) that where an exchange of notes was made for the purpose of raising money, at a greater rate of interest than seven per cent per annum, and the transaction was so understood, and the plaintiff charged under the name of commissions, for advancing his notes and making such exchange, a greater sum than the legal rate of interest, the transaction was intrinsically a loan and usurious and void.

In *Dey* v. *Dunham*, (2 John. Ch., 192,) where the defendant gave his note in exchange for another of the same amount, both having six months to run, and charged two and a half per cent commission for his risk, Chancellor KENT held that this was not usurious, because the commissions did not exceed the legal rate of interest for six months. And the Chancellor adds, "if he had taken more than at the rate of 7 per cent per annum for the amount of his notes for the time they had to run it would probably have been usury in disguise." (Referring to 13 J. R., 40, and 1 Camp. N. P. R., 177.)

In *Dunham* v. *Gould*, (16 J. R., 367,) the plaintiff exchanged his own notes for others and charged two and a half per cent commission, that being more than after the legal rate of discount for the time the notes had to run, and the jury found that this exchange was for the purpose of raising money at a greater rate of interest than seven per cent per annum, and the Court of Errors unanimously affirmed a judgment for the defendant. The verdict was deemed to establish that it was a shift or contrivance to get rid of the statute of usury.

In *Fanning* v. *Dunham*, (5 Johns. Ch., 122,) the transaction was similar, and the Chancellor being of opinion that the transaction was an exchange of notes for the purpose of raising money by the one party, and for the purpose of exacting a premium of two and a half per cent for the loan of his paper by the other, held the transaction void for usury.

In *Steele* v. *Whipple*, (21 Wend., 103,) a charge for indorsing and procuring the note of another to be discounted in the bank had been made which exceeded the rate of seven per cent per annum, and the Supreme Court held, such indorser having taken up the note, that the note was void in his hands for usury. Mr. Justice COWEN says: "If one man give his acceptance or *note* for *another*, on an agreement for a compensation, it has long been

settled that this is usury *per se.*" * * * "I have no hesitation in saying that a man can no more lend his indorsement for a compensation beyond seven per cent, than his money."

On the other hand, it was held by the Supreme Court in *Trotter* v. *Curtis*, (19 J. R., 160,) that a charge by a commission merchant of two and a half per cent, in addition to interest, for advances made (without funds in hand) to pay the drafts of his principal, was not usurious, if not intended as a cover with a usurious intention; and in *Suydam* v. *Westfall*, (4 Hill, 211,) the Supreme Court held that an agreement by the principal to keep his commission merchant in funds by shipments of produce, and to pay him two and a half per cent on all advances met by the commission merchant otherwise than with produce, was not necessarily usurious; and the jury having found that the charge was a reasonable compensation for trouble, and warranted by the usage of trade, the transaction was sustained.

In *Ketchum* v. *Barber*, it was held by the Supreme Court, (4 Hill, 244,) that the *bona fide* sale of one's credit by way of guaranty or indorsement, *though for a compensation* exceeding legal interest, is not usurious, if the transaction be unconnected with a loan between the parties. The plaintiff had charged two and a half or three per cent for indorsing the paper of another. In the opinion in this case, Chief Justice NELSON repudiates the idea that the question of usury or no usury depends on the inquiry whether the per centage charged exceeds seven per cent per annum for the time the credit is to continue, and holds that an extravagant charge for a guaranty purely as such, is no more usury than if exacted for goods or stocks, or any other species of property, and he reviews the previous cases bearing on the question. (See *Oakley* v. *Boorman*, 21 Wend., 588.)

But in the Court of Errors, although the judgment of the Supreme Court was affirmed on another ground, a majority of the judges appear to have been of opinion that a charge for merely indorsing another's paper constitutes usury if it exceed the rate of seven per cent per annum for the period of credit.

Assistant Vice-Chancellor SANDFORD, in *The New York Dry Dock Co.* v. *The American Life Insurance and Trust Co.*, (3 Sand., Ch. R., 256,) reviews the doctrines applicable to an exchange of paper and a sale of credit, and he also repudiates the idea that

when a charge of commission for lending one's credit is tolerated at all, it is to be limited to the legal rate of interest; and his conclusion, from an examination of the cases, is, that wherever a commission is charged by the lender, unless it be for some real service distinct from the loan itself, and then be a moderate and reasonable charge, it must infallibly be referred to the use of the credit loaned, and would constitute usury. Upon all the facts in that case, however, he finds that the transaction was a loan, intended to enable the borrowers to obtain money, for which they, in the first instance, applied to the defendants, and that the various reservations could not be referred to anything but a compensation for a loan, which at first consisted of certificates of deposit, and when they were paid by the defendants, the transaction was in truth a loan of money.

If the question were to be determined according to the weight of authority resulting from the cases above mentioned, it would seem that a reservation of a commission upon an advance of one's credit, whether by way of indorsement upon paper made to be discounted by a third party, or by way of exchange of notes, if not invariably usurious, whatever be the rate, is so when the commission charged exceeds the rate of seven per cent per annum for the time the credit is to run, unless it is shown that the commission was not charged as and for compensation for the advance of credit and the risk of loss, but for some other and distinct consideration, as for services or trouble to be taken or performed.

And when the case last cited came before the Court of Appeals, Mr. Justice CADY in his opinion insists strenuously upon the law as in substance thus stated, and holds that an exchange of credits with a reservation of more than seven per cent per annum to one of the parties, is usurious and void.

But we are informed by the report of the case in the Court of Appeals, (3 Comst., 362,) that a majority of the court concurred in the reasons, and placed their judgment upon the grounds stated in the opinion of Mr. Justice GARDINER.

In that opinion he begins with dissenting from the views of Mr. Justice CADY on the very point we are now considering. He defines credit as "the capacity of being trusted;" "it cannot be loaned." "When A., for a consideration paid by B., executes a

promissory note and delivers it to B. to be used for his benefit, it is not a chose in action in the hands of B., and yet he has received precisely what he contracted and paid for, namely: the privilege of availing himself of A.'s credit with third persons. When the credit is used and a trust obtained, its whole office is fulfilled; it becomes *functus officio*, and in the nature of things, can never be returned. The credit of one person may be rendered available to another by gift or sale, and in no other way. This may be done * * as an exchange of notes, which is a sale of one promise for another. * * When the responsibility is incurred gratuitously, it is, in popular language, a loan; and when for a consideration, a sale of credit. In this sense, a sale of credit is no more within the prohibition against usury than a sale of merchandise. It is sometimes asked, Why should a man be permitted to receive ten per cent on an exchange of notes, when, if he advanced money on the same security, he would get but seven? The answer is, For the same reason that he is permitted to receive $20 for six months' use of furniture valued at $100. The one is prohibited and the other not." After further like propositions and a review of some of the cases, he says: "Neither sales of credit nor loans or sales of property other than money are touched by the statute. It is not enough that the vendee wants money and that this is known to the opposite party. Neither the necessities of the vendee nor the use he contemplates making of his purchase will deprive the vendor of his right to determine for himself the terms on which he will part with his property."

"It follows that in every instance where the contract is in form one of sale or exchange, * * * if the Court, in looking at the whole transaction, can see that the value secured to the vendor was in good faith but the price of the thing sold or exchanged by him, there can be no usury whatever the price may be or the mode in which it may be reserved."

These views were re-affirmed in *Leavitt* v. *De Launy*, (4 Comst., 363,) which was affirmed in the Court of Appeals, "for the reasons stated in the opinion of Gardiner, J."

In *More* v. *Howland*, (4 Denio, 268,) the plaintiffs had consented to advance their own notes to the defendants, which the latter should pay or provide for at maturity, and for this the plaintiffs were to receive a commission or compensation of two and a half per

cent (which was more than seven per cent per annum for the period of credit.) BRONSON, Ch. J., says "it was a sale of credit and nothing more;" "there was no usury in the case." "As the law now stands, a man has as good a right to sell his credit as he has his goods or his land; and if he deal fairly, he may take as large a price as he can get for either of them."

In *Schermerhorn* v. *Talman*, (4 Kern., 117–119,) the opinion of Mr. Justice SELDEN does not in all respects harmonize with the reasoning of GARDINER, J., above referred to, but the decision in the cause does not involve any conflict with that reasoning.

It seems to us, therefore, that we are now bound to say, that the mere fact that the present plaintiff received 2½ per cent commission for exchanging his note for that of Lane, West & Co., did not make the latter note so wholly void in their hands, that the defendant can say or that we can say as matter of law, that the check was without consideration; and if not, then this ground did not warrant an unqualified direction to the jury to find for the defendant.

3. Another ground upon which the defendant's counsel insists that the instruction given to the jury was proper is, that Lane, West & Co. had failed when their note was sold to the defendant, and for that reason the defendant had a right to rescind the contract, return the note and refuse to pay his check.

This claim is, we think, answered by the suggestion, that although the case shows that Lane, West & Co. stopped paying their notes on the 13th of October, it was not proved that they were unable to pay anything, or that the note was worthless. In so far as this point is concerned, the parties were dealing with each other at arms-length. Even the defendant had so little confidence in the responsibility of Lane, West & Co., that he was not willing to buy the note unless the note he already owned was paid. He received just what he bargained for. No fraud or deception was practised in respect to the question of the solvency or insolvency of the makers of the note. We find no warrant for holding that he had any right to refuse to pay his check upon this ground. The cases to which we were referred do not go so far. The payment of a debt in the notes of an insolvent bank, which it is held may be treated as no payment, furnishes no illustration of the claim to rescind under such circumstances as the present. Nor

do the cases, which hold where a contract is wholly executory (*e. g.*, an agreement to sell goods for the note of a third person,) and the makers of the note become insolvent before the contract is performed, the party is not bound to receive such note, apply to this case. Here the contract was fully executed, the note delivered and accepted, and the check was given in payment. The defendant could afterwards, in the absence of fraud or warranty, no more rescind than the purchaser of goods or chattels when he finds, after delivery and acceptance, that the goods, &c., are not so good or so valuable as he supposed they were when he made the purchase. (*Des Arts* v. *Leggett*, 16 N. Y. R., 582, 588; *Benedict* v. *Field*, id., 595.)

And for like reasons, the suggestion that there was a mutual mistake—that the parties both supposed that they were dealing with the note of a solvent firm—fails to warrant the recision of the sale. From the very nature of the transaction, the solvency and credit of the makers of the note were before the minds of the parties, and the very question in agitation was, whether the defendant would or would not take the risk of the payment of that note by the makers. The plaintiffs were proposing to avoid that risk by selling the note without indorsement. The defendant was consenting voluntarily to assume that risk for a consideration to be paid to him. I can hardly conceive a plainer case for the application of the maxim *caveat emptor*. The defendant and the makers both were in the city; very slight diligence would have informed the defendant of the state of the firm of Lane, West & Co., the makers. If he thought proper to make the purchase without further inquiry he ought not here to be permitted to allege his mistake. (*Milner* v. *Duncan*, 6 Barn. & Cres., 671.) In *Van Winkle* v. *Commercial Insurance Company*, in the Court of Errors and Appeals of New Jersey, November 3d, 1858, the defendants having issued a policy of insurance insuring a building against fire from a day already past, were held liable, although at the time of issuing the policy the building had already been burned, upon the ground that such was the risk they had voluntarily assumed.

The defendant here was a volunteer assuming to take the risk of the payment of the note of a third person; he received just what he bargained for, and if the note was not so likely to be paid as he supposed he had bargained for the risk.

Aiken v. *Short*, (1 Hurlst. & Norm., Exch. R., 210; 37 Eng. L. and Eq. R., 592,) where the plaintiff sought to rescind on the ground that there was no title to the mortgaged premises upon which he had wholly relied in paying the defendant a debt which was supposed to be secured thereby, is a much stronger case than the present, and yet the court held that he was not entitled to rescind on the ground of mistake. (See, also, *Gompertz* v. *Bartlett*, 2 Ellis & Bl., 849; 24 Eng. L. and Eq. R., 156.)

4. Finally: The question remains whether it was so clearly proved that the check was obtained by Mills by false representations, that the case should not have been left to the jury?

We incline rather to the opinion that the weight of the evidence preponderates against the defendant's claim in this respect. We of course assent to the decision heretofore made in this case, that the plaintiff cannot claim the benefit of the transaction without being affected by the misrepresentations of Mills, if such misrepresentations would have entitled the defendant to avoid the check had Mills himself been the party in interest and claimed to recover on the check.

All pretense of actual or intended fraud or falsehood on the part of Mills, in representing that the previous note was paid, is, we think, fully disproved.

It is settled, we apprehend, that, to entitle the defendant to avoid his contract on the ground of misrepresentation, it must appear not only that the representation was made, that it related to some material fact, and that it was untrue, but it must also appear that the defendant *relied* upon the representation, that he acted on the faith thereof; and this imports not merely that he believed the fact to be as it was represented to be, but that his belief was founded on the representation.

If the defendant refused to rely on Mills' representation, sought information for himself, and finally acted on belief founded on information derived from other persons, or resting in circumstances not connected with Mills' statements, then he was not misled by what Mills said; he did not act in reliance thereon, and he was not deceived by *that*, if he was deceived at all, and he cannot avoid his contract. (2 Kent, 484, n. d.; 1 Story Eq. Jur., § 191; and cases cited, n., 3; id., §§ 197, 200, 202.)

Now it is true that the defendant's testimony in his own behalf tends to show not only that he relied upon Mills' statement, but that that formed the very ground of the purchase of the note and the giving of the check, and was so understood by Mills at the time.

But this is contradicted by Mills, who testifies, in substance, that, at the time the representation was made, the defendant refused to rely upon it, and refused to buy the note; that afterwards, when he saw him again, the defendant's language indicated that he had satisfied himself on the subject; having previously refused to buy the note, stating, as a reason, (and notwithstanding Mills' statement,) that he had received no news of the other note, he now said, "I believe that note is paid, and I *have made up my mind* to buy this." These circumstances indicate, with no little distinctness, that the defendant did not rely on Mills' statement made, as Mills says, in the morning, but sought information for himself, and acted in reliance upon what he had learned elsewhere, and on the fact that he had received no notice of protest. This is strongly corroborated by the plaintiff's testimony to his declarations: "That he had *presumed* the note was paid; for that up to three o'clock on the 14th, on going to the Nassau Bank, they had told him that they presumed it was paid, as they had received no notice of protest;" "that they told him that if the note was not paid they should have received notice of protest before three o'clock." And again he said, "Up to three o'clock of the day before, they had received no notice of protest at the Nassau Bank, and *he had presumed from that* that the note was paid." This it is testified he stated in explanation of what he did, and "he did not, in this conversation, say anything about Mills having assured him it was paid."

Upon this state of the proofs, if the evidence does not so greatly preponderate against the claim that the defendant purchased the note and gave the check in reliance on representations of Mills, which proved untrue, that a verdict for the defendant on that ground could not be sustained, it is at least clear, we think, that the unsupported testimony of the defendant himself did not, in the face of the contradiction, warrant an instruction that he was entitled to a verdict. It seems to us that the case should have been submitted to the jury.

For these reasons the judgment should be reversed, and a new trial be ordered; costs of the appeal and of the former trial to abide the event.

PIERREPONT, J., dissented.

Judgment reversed, and new trial granted.

HENRY I. SEAMAN v. DANIEL LOW.

1. Where a plaintiff, by the fraud of the defendant, has been induced to contract to purchase property from the latter, (viz., 250 shares of the stock of the Staten Island Association,) and has made payments thereon, he may, on discovering the fraud, rescind the contract and recover back the money so paid.
2. Before the Code, such money could be recovered back, by action of assumpsit, under a declaration containing only the common money counts.
3. Where the defendant sold to the plaintiff shares in an association formed for the purpose of buying and selling lands and dividing the profits thereof, and promised as part of the terms of sale that he would put into the association two farms at the cost thereof ($16,000); but the defendant subsequently, before the shares were delivered, contributed the farms at a much greater sum, ($85,000,) and received payment therefor from the association; the plaintiff was not bound to receive the shares so sold. The dealing of the defendant therewith altered their substantial character. They were not aliquot parts of the same capital which they were by the terms of sale to be, and the plaintiff is entitled to recover back the payments he had made on account of the sale.
4. In such an action, and under such a declaration, the plaintiff will not be precluded from showing such fraud as establishing a right to rescind and reclaim the money, merely because he has furnished a bill of the particulars of his claim; which bill states the said payments, ($5,250 in all,) and their dates, and describes them as so much "money received by defendant, on account of stock which defendant never delivered to plaintiff," and also claims "the further sum of $5,250, being the proceeds of 250 shares of the stock of the Staten Island Association, sold by the defendant on account of the plaintiff, on the 1st of November, 1838," with interest, &c.
5. Especially should it be so held, when there is not only no affidavit or other evidence furnished by defendant of surprise, or that he has been misled,

but on the contrary it appears that the defendant had actual and timely notice, that the ground of the plaintiff's claim to rescind was the defendant's fraudulent representation to induce the plaintiff to contract for the 250 shares.

6. It is not the office of a bill of particulars to state the grounds upon which the plaintiff claims to recover, but only to point out the items and particulars embraced in his claim so as to identify them.

7. A variance between the proofs and the plaintiff's bill of particulars will not be deemed material unless the defendant is misled thereby.

(Before Slosson, Woodruff and Pierrepont, J. J.)

Heard, October 15th, 1858; decided, March 12th, 1859.

This case comes before the Court at General Term, on questions of law arising at the trial, and there ordered to be heard, in the first instance, at the General Term. It was tried before Mr. Justice Slosson and a jury, on the 16th of November, 1858, when a nonsuit was ordered.

The action was commenced on the 6th of November, 1838, by the service of a declaration, which contained the common money counts, in assumpsit. The plea was the general issue, with a notice of set-off, for goods sold, labor performed, money lent, money paid for plaintiff, and for money by him received to defendant's use. There had been three previous trials of the action in this Court. On the second trial judgment was rendered for the defendant, and on the third trial for the plaintiff, and each of those judgments was reversed by the Court of Appeals.

The following is a brief summary of the facts proved, or offered to be proved at the trial in November, 1858, and of the proceedings there had.

1. On the 9th August, 1836, certain persons, of whom the defendant was one, owning lands at Clifton, near the Narrows on Staten Island, agreed to form a Joint Stock Company in the nature of a partnership, to sell out the same by retail in parcels, believing (as the articles of association declared) that a profit might be thereby realized to said Company.

A subscription paper was accordingly drawn up of that date, whereby the subscribers thereto agreed to take a specified interest in the real estate, already purchased and to be purchased within the then present year.

Articles of association (called The Staten Island Association) were formed to carry out this purpose, signed by the defendant,

constituting the subscribers thereto stockholders; dividing the lands into 15,000 shares of stock; which provided that the then present owners should convey the land to trustees named; constituting the defendant Low a director, and providing for dividing the net yearly sales among the stockholders *pro rata.*

2. At this time the defendant Low owned two farms, one of which was purchased by him September 20th, 1834, for $6,000, and the other September 30th, 1835, for $10,000, in all $16,000, which were put into the capital of the association.

They were by him conveyed November, 1837, to the association, the one costing $6,000 at $25,000; the one costing $10,000 at $60,000; in all an advance of $69,000 over the cost of $16,000.

3. The defendant made a contract with the plaintiff before the said conveyances to the association, for $10,000 at par of the shares, being 250 shares; and at various dates, from September 6th, 1836, to April 17th, 1837, the plaintiff made payment of sundry sums as installments, on the shares to defendant. There were five of such payments, and the aggregate amount was $5,250.

4. At the time of the contract between these parties, (as the plaintiff offered to prove,) the defendant represented that he would put in these lands at cost, while the shares he professed to sell to the plaintiff in fact consisted of a part of his excess over cost.

5. On the 6th November, 1838, the plaintiff demanded the return of his money from the defendant, and, the defendant being about to go to Europe, he brought the present action on the same day.

6. On the 7th November, 1838, the defendant tendered to the plaintiff the 250 shares, demanding payment of the amount of the installments, then unpaid.

7. And the defendant, after this suit had been brought, (as the plaintiff offered to prove,) applied the 250 shares to his own use.

8. The plaintiff sought, by this action, to recover back the money which he had paid on the contract, on the ground of such fraudulent representations and deceit.

9. During the suit, on the 2d March, 1842, a bill of particulars of the plaintiff's demand was rendered, which stated the

said payments and their dates, and described them as so much money "received by defendant, * * on account of stock which defendant never delivered to plaintiff;" and which bill of particulars also claimed "the further sum of $5,250, being the proceeds of 250 shares of the stock of the Staten Island Association, sold by the defendant on account of the plaintiff, on the 1st of November, 1838, together with interest thereon from that date."

10. The Judge excluded evidence of defendant's aforesaid representations, and of their falsity; also evidence that the defendant, since this suit was commenced, had sold said stock; also that the defendant, in November, 1843, "was informed that the plaintiff complained that the defendant had represented that he had put his lands aforesaid into the association at their cost, but that he had put them in at a greatly enhanced price, as a ground of reclaiming his payments;" and also, that on the 21st of October, 1857, notice had been given to defendant's attorney that the plaintiff would be examined on the trial as a witness, (*inter alia*,) "on the representations made by the defendant to the plaintiff, as to the property of the defendant paid or put into the Staten Island Association, the rate at which it was put in, and the cost and value thereof."

"Also, as to the defendant's representation to the plaintiff to induce him to agree to take the stock, and the untruth or truth thereof."

The whole of this evidence was objected to, on the ground that all of it "was variant from the matters contained in the plaintiff's bill of particulars, and therefore inadmissible;" and that any act of the defendant in selling the stock after this suit was commenced could not create a right to maintain it, and that evidence of any such act was irrelevant. The evidence was excluded and the defendant excepted. At the close of plaintiff's evidence, he was nonsuited, and he excepted to that decision.

The questions of law raised by such exceptions were, at the trial, ordered to be heard, in the first instance, at the General Term.

Daniel Lord, for plaintiff.

I. The fraud was such as rendered the contract between the plaintiff and defendant void, and entitled the plaintiff, on demanding back his money, to recover it.

1. The price at which the defendant's lands were put in entered into and constituted a vital part of the contract, between the plaintiff and defendant.

2. The other associates had no connection with this transaction between the plaintiff and the defendant, and it was not necessary for the plaintiff to implead any other than the party who had committed the fraud and had its proceeds in his hands.

3. The plaintiff, by demanding back the money specifically, had done all which was required of him to rescind the contract, and to entitle himself to the money.

4. He was not bound to state the ground on which he claimed it back; his demanding back all the price or money paid was a full and sufficient act of rescinding. The defendant must be supposed to know the ground, having himself committed the fraud.

5. All that is required for rescinding is, to make a demand in such terms as is only consistent with rescinding.

The demand in the plaintiff's letter of November 6, 1838, was fully sufficient.

II. The bill of particulars did not exclude the plaintiff from his claim.

1. The only office of a bill of particulars is to specify dates, sums and consideration. Here all were specified.

2. The bill of particulars is in all respects true and consistent with the plaintiff's claim. It does not, as supposed by the defendant's counsel, specify a claim for not delivering stock.

3. It is literally and substantially true, both as to the identifying of the stock and as to excusing any redelivery on a rescinding.

4. It imported with certainty a rescinding, as the only interpretation reasonably to be given to its language. It could not be understood as claiming back money paid on a contract unperformed as yet by the plaintiff, nor because a fair bargain had become unprofitable.

5. The object of a bill of particulars is only to prevent surprise at the trial. That object was fully accomplished.

6. The plaintiff's case being of great justice, should not be excluded by a strict construction of a bill of particulars.

Charles O'Conor, for defendant.

I. The second and third heads in the plaintiff's bill of particulars are entirely irrelevant. They afford no basis for the evidence offered. (*Quin* v. *Astor*, 2 Wend., 579; *Humphrey* v. *Cottleyou*, 4 Cow., 55.)

II. The first head in the bill of particulars afforded no legal basis for the admission of the evidence offered.

1. The exceedingly comprehensive efficacy of the common counts, and particularly of the count for money had and received, left the plaintiff in assumpsit a range of proof almost unlimited, and left the defendant virtually without notice of the claim intended to be proven. The declaration was merely "a legal fiction." (10 Mass. R., 436; *Osborn* v. *Bell*, 5 Denio, 376; 1 Chitty's Pleadings, 8th Am. ed., Springfield, A. D. 1840, side paging 100 and notes, 107 and notes, 352 and notes; *Putnam* v. *Wise*, 1 Hill, 240, note.)

2. To obviate the gross injustice which must often result to the defendant from this extreme liberality towards the plaintiff, the practice of requiring a bill of particulars was introduced. The bill of particulars was a natural, as contradistinguished from a technical procedure. In this respect it possessed the character claimed for the system of pleading introduced by the Code. In this method of procedure formal variances are less regarded than they were in construing common law pleadings. But variances in the nature and substance of the statement are more effectually guarded against and prevented than was practicable under the logic of the common law. (London Law Mag. and Rev. for Feb., 1858; *Walter* v. *Bennett*, 16 N. Y. R., 253.)

(1.) An identity of principles must have governed the practice and decisions in respect to the conformity required to exist between a bill of particulars in debt or assumpsit under the old system and that which should now govern in the ordinary action under the present Code. (*Hess* v. *Fox*, 10 Wend., 438, 439.)

(2.) If the old system allowed a recovery, based upon fraud, and as upon a tort in an action *ex contractu*, it was, in that respect, very paradoxical, inconvenient to the Court and oppressive to the defendant. Besides, it violated that leading and fundamental principle of practice, that tort and contract should neither be blended upon the record nor tried together—a principle so much

approved that it is expressly saved by that great destroyer, the Code itself. (17 Pick., 549; 1 T. R., 387; 10 Mass., 436; 2 Hall's N. Y. S. C. R., 453; Cur. per Van Ness, 6 Johns. R., 141, 142.)

(3.) The soundness of such a practice is very doubtful. But assuming it to have been established by judicial opinion, then the bill of particulars was the antidote to its evil tendencies, and full effect should be given to the latter, so as to prevent surprise. (*People* v. *Monroe C. Pleas*, 4 Wend., 200; *McNair* v. *Gilbert*, 3 Wend., 346; *Chesapeake, &c.*, v. *Knapp*, 9 Peters, 564.)

3. The theory of the plaintiff's demand, as set out in the first head in the bill of particulars, is sound, simple and intelligible. It is that he purchased stock from the defendant and paid for it; and that the defendant having made default in delivering the stock, he claimed to rescind the violated contract and to recover back his money. (1 Wend., 64; 12 J. R., 363; id., 274.) Nothing could be more widely different from this than the two grounds of recovery suggested in the indefinite offers made at the trial. In the most favorable view for the plaintiff, these were—first, fraudulent representations, which would entitle the plaintiff to rescind the contract *in toto;* and, secondly, imperfect performance of the contract, in selling his lands to the Company at a higher rate than he had promised. The defendant could not have anticipated or prepared for a case so foreign in its whole scope to that stated in the bill of particulars. (*Davenport* v. *Davies*, 1 Mees. & W., 570; *Meering* v. *Hellings*, 14 id., 711, in point; *Desoby* v. *Delaister*, 2 Harr. & Johns., 221, 3d exception; *Law* v. *Thompson*, 15 Mees. & W., 543.)

(1.) If the plaintiff intended to claim that the contract was obtained by a fraudulent representation of a preëxisting fact; *i. e.*, that plaintiff had conveyed his property to the Company at a lower price, the bill of particulars clearly points to an entirely different case.

(2.) If he meant to claim that a fraud had been committed by the plaintiff in representing that he would thereafter convey to the Company at a lower price than he actually exacted; there was, in his proposed case, a double infirmity.

(*a.*) Fraud cannot be predicated of the breach of a promise. (*Alston* v. *Mech. Mut. Ins. Co.*, 4 Hill, 336, 342; 18 Wend., 609;

6 Cow., 352; 6 Harr. & Johns., 252–426; 9 Watts, 572; 1 Rawle, 315.)

(*b*.) It was an entire deviation from the ground of action suggested in the bill of particulars.

4. If the plaintiff sought to recover on the ground that the defendant had violated his promise, by charging the Company too much for the lands conveyed, the claim was not admissible in this action for many reasons.

(1.) It was an entirely different ground of action from that specified in the bill of particulars.

(2.) Under the circumstances it was not a ground of total rescission. The defendant had conveyed his land, and the parties could not be placed in their original condition. Consequently, the plaintiff could only recover, at most, his damages, in a special assumpsit, founded on the subsisting unrescinded contract. (*Lynch* v. *Robertson*, 18 Johns., 456; 6 Cow., 17; 5 Hill, 390, 391.)

(3.) In an action to recover such damages, all the associates would be necessary parties. This objection may be taken at any stage of the action, especially as neither the declaration nor the bill of particulars afforded the defendant an opportunity of setting up the non-joinder in his pleadings. (*Williams* v. *Allen*, 7 Cow., 318.)

III. Seventeen years before the trial, this court solemnly determined that this evidence was not admissible under the pleadings and bill of particulars. The plaintiff did not apply for leave to alter or amend his proceedings; and the defendant, in reliance upon that judgment, and the implied approval of it by all the courts of appeal, has forborne to perpetuate testimony or otherwise to notice the pretense. It would be manifestly unjust to depart, at this late day, from the rule thus adopted as the law of this case. (5 Wend., 375; 6 Cranch, 267; *Oakley* v. *Aspinwall*, 3 Kern., 505; *Seaman* v. *Low*, in this court, June term, 1854.)

IV. The notice given just before the last trial cannot affect the question, unless it be to show the court how dangerous it would be to afford this desperate and defeated litigant an opportunity to make a new case by his own testimony. No facility should be afforded to such desires.

V. It is quite apparent that, after struggling for years to obtain and hold a judgment, founded on the allegation that he once owned this stock, and had sold it to the defendant, this plaintiff should not be permitted to change his ground, and, for any reason, to rescind the contract under which his title accrued. (*Harnor* v. *Groves*, 29 Eng. L. and Eq., 220.)

VI. The offer to show that the defendant had converted the stock to his own use, after the commencement of the action, was manifestly inadmissible. If the plaintiff had given evidence of a cause of action existing when the suit was commenced, and such evidence was contested, or in any degree equivocal, then it may be that facts occurring after suit brought might have been shown to fortify the plaintiff's case. But a cause of action could not be made out in this case by proving that the defendant had been guilty of a conversion of the plaintiff's property after suit brought.

The nonsuit should be affirmed.

PIERREPONT, J. But for the bill of particulars in this case, the plaintiff might have shown that the defendant had money of his (the plaintiff's) to which he had no right, and which he had obtained by false representations, fraud or deceit, and the evidence offered by the plaintiff, touching the defendant's representations, would clearly have been admissible.

A bill of particulars does not change the nature of the action. It is not a declaration, nor is it a novel assignment. Its office is to apprise the opposite party of the claim made against him, so that he may not be surprised at the trial; and an omission or mistake not calculated to mislead, will be deemed immaterial. (4 Wend., 360.) An error in date, or in describing a parish, in an action for rent, or in describing the plaintiff's business or the defendant's association, has been held to be immaterial. (2 Taunt., 224; 1 How. Pr. R., 172; 3 M. & S., 380; 8 Bing., 411; 10 Wend., 258; 3 Wend., 344.)

And Lord ELLENBOROUGH held, that where a payment made on account of the defendant to A., was stated in the bill of particulars to have been made to B. it was immaterial unless the defendant would make affidavit that he had been misled by the particulars. The cases on this subject are very numerous, and

they all tend to establish the doctrine that, where the bill of particulars has not misled the opposite party, he cannot take advantage of it to exclude the offered proof. In the case before us there is no suggestion that the defendant had been misled, or that he was surprised by the offer at the trial. Before the suit was commenced the plaintiff had given the defendant written notice that, "as the whole project had entirely failed," he demanded back the money which he had paid. On the day after, the defendant "refused to receive the stock or to pay any more money, alleging the reason to be, because he considered it worthless and of no value."

The bill of particulars stated the dates of the payments and the amounts of the money which the plaintiff sought to recover back; and undertaking to make it more specific, stated how or on what account it happened to have been paid.

The defendant could hardly have been misled by this bill of particulars; it was a clear indication that the plaintiff claimed to recover back the money paid at the dates specified, and paid on account of stock which had never been delivered. The exact amount of money was claimed, with interest from the dates of payment, and not damages for breach of contract in not delivering the stock. If the defendant had deemed the meaning doubtful, he could have moved for a more specific bill. But the whole, taken together, does not admit of the unequivocal interpretation that the plaintiff claimed damages on breach of contract or for a conversion of the stock. I do not think the defendant was either misled by the particulars, or surprised by the offer at the trial, and I am acquainted with no rule of law which should compel the Court to exclude the evidence (as offered) of the defendant's representations.

This cause was tried since the passage of the Code which was designed to introduce a more liberal practice than before existed, and the act of 1849, (ch. 439, § 2,) made its provisions applicable to existing suits. (Code, § 169.)

The plaintiff in this action would have had a right to recover back his money paid, if the consideration had wholly failed; or if the thing offered was quite different from the thing bargained for

In the case before us the offer is to show that the stock tendered was a widely different thing from the stock bargained for

and on account of which the plaintiff had paid his money; that it was a sham stock, a deceit, issued upon fancied profits and not upon any real basis.

I think the evidence competent under the pleadings in the case, and that a new trial should be granted, with costs to abide the event.

WOODRUFF, J. It is not claimed that, under the complaint or declaration in this action, the evidence which the plaintiff offered on the trial was incompetent, unless the plaintiff's bill of particulars had limited the general scope of the declaration, so as to debar him from claiming to recover upon the facts sought to be proved.

The declaration was in the action of assumpsit, and contained only what, before our Code of Procedure, were called the common counts.

The bill of particulars stated a particular account of the plaintiff's demand, as follows, viz.:

"For $1,000 received by defendant on 6th September, 1836, (on account of stock which defendant never delivered to plaintiff.)

" $1,500 received by defendant, September 28, 1836, (")

" $1,000 " " November 1, 1836, (")"

and so on.

The plaintiff's proofs showed that certain parties, among whom was the defendant, under date of August 9, 1836, agreed to take an interest in real estate "then purchased, or about to be purchased," on Staten Island, within that year, and to the amounts affixed to their respective names—the purchases in all not to exceed 1,500 acres, or $600,000 in amount—with a view to realize a profit on sales to be made thereof: Also, that, under the same date, articles of association were entered into, reciting that the defendant Low and Moulton Bullock, and others, had purchased and were then seised of several parcels of land on Staten Island, which they had laid out into lots and proposed to sell and they deemed it desirable to form the owners and partners interested into a joint stock company to sell out the same for the benefit of the joint stock company by retail—it being believed that a profit may be realized to said company by such sales.

After such recital, the articles provided that the property of the company, consisting of the aforesaid real estate, should be divided into 15,000 shares; that the said Bullock and others now holding the title should convey the land to trustees named, for the benefit of the association and for the owners of stock (or shares) in proportion to the number of their respective shares; that directors should be appointed, and a president and other officers and agents; that shares might be transferred on the books of the company, and should be personal property; that the directors should take charge of the moneys received from sales, make payments, make all contracts, regulate prices and direct the sales of the real estate, and declare dividends.

The plaintiff then gave evidence, which was probably sufficient to show *prima facie*, that, on or about the 6th of September, 1836, the defendant sold to him 250 shares, at the price of $10,000, and received sundry payments thereon, which payments were those mentioned in the plaintiff's bill of particulars, and which, by this action, the plaintiff sought to recover back. There was also evidence given that, in November, 1838, the agent of the defendant called on the plaintiff and demanded the amount remaining unpaid, produced to the plaintiff a certificate for 250 shares of stock, and offered to transfer the same to the plaintiff upon receiving the amount due; that the plaintiff refused to pay the balance or receive the certificate, because the defendant had never offered him the stock before, and also because he considered the stock worthless and of no value.

The plaintiff then offered to prove that, when he made the contract with the defendant for the shares, the defendant represented to him that he would put into the association the lands which the defendant then held, at their cost.

And also to show that, at that time, the defendant held lands which had cost him $16,000; that, instead of conveying them to the association at this price, he put them in at a great excess over their cost; and that the stock which he sold to the plaintiff was received by the defendant from the association as mere profit and as the excess in the price at which he sold the lands to the association over the price paid for the said lands. And the plaintiff, as part of his proofs, offered in evidence the deeds to the defendant, by which he became the owner of the lands for the

consideration of $16,000, expressed therein, in 1834 and 1835, and deeds from the defendant to Moulton Bullock, dated November 1, 1837, for the same lands, for the consideration of $85,000, and a deed from Bullock to the trustees of the association, dated November 17, 1837, for the nominal consideration of $1, conveying the same lands.

The purpose, thus declared, was, to show, that, instead of putting his lands into the association at their cost, the defendant, more than a year after the sale to the plaintiff, and before the stock was issued which was the subject of that sale, adopted the circuitous mode of conveying to Bullock for a consideration of $85,000—Bullock conveying to the trustees.

These proofs were rejected, on the ground that such proof "was variant from the matters contained in the plaintiff's bill of particulars, and, therefore, inadmissible."

By chapter 439 of the Laws of 1849, section 2, subdivision 1, sections 169 and 176, inclusive, of the Code of Procedure, were made applicable to future proceedings in existing suits; and subsequently, by the 459th section of the Code of Procedure as amended in 1851, the provisions of that act are made to apply to the trial and all future proceedings in actions then pending, when there is an issue of law or of fact, or other question of fact to be tried.

This action was commenced in 1838, and the trial upon which the question now under consideration arose, was had in 1858.

The provisions of the Code of Procedure are therefore applied to this trial, and all subsequent proceedings in the action.

By the 169th section of the Code, it is enacted that no variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits; and whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled.

By section 170, it is provided that where the variance is not material, as last above provided, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

On the other hand, in order that some limitation may be imposed upon the great generality of the sections, section 171 provides that where the allegation of the cause of action, to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

In applying these provisions of the Code to the present case, let it be supposed that the words of the bill of particulars were actually inserted in the declaration itself to designate the moneys had and received by the defendant, which the plaintiff sought here to recover, and let it be assumed that the proof offered was variant from the allegation; for it was upon that ground alone that the evidence was rejected; was the variance in the entire scope and meaning of the allegation of the cause of action? or was it a variance in some particular only?

The nature of the claim, to wit, for moneys had and received by the defendant on the days specified which he was not entitled to retain, is not sought to be changed. The identical moneys are claimed in the allegation and under the proofs offered, and under each they are described as received by the defendant on account of stock. The only difference between the allegation and the proofs offered, is that in one it is stated that the stock was never delivered, by the other it is sought to show that the conduct of the defendant in relation to the stock was such that he could not deliver the stock in the state and condition, or conferring the rights, which were contemplated at the time of the purchase; or, in another aspect, that the conduct of the defendant was such that the plaintiff was not bound to receive the stock.

It seems to me that this was, at most, a variance "in a particular only." In either aspect the cause of action is identical in its scope and meaning. The words, "which the defendant never delivered to plaintiff," might be stricken out, and still the cause of action would be well and sufficiently stated; and if so, then the admission of the evidence offered would certainly not leave the allegation of the cause of action unproved in its entire scope and meaning.

No proof was offered by the defendant that the variance had misled him, or that its reception would mislead him, to his pre-

judice; while on the other hand the plaintiff offered to prove circumstances which would seem to have apprised the defendant that the plaintiff would, on the trial, claim to recover on the precise ground which he sought to establish by the evidence offered.

The cases of *The Dry Dock Bank* v. *The American Life Ins. and Trust Co.*, (3 Comst., 344,) *De Peyster* v. *Wheeler*, (1 Sandf. S. C. R., 719,) *Jackson* v. *Sanders*, (1 Code R., 27,) *Fort* v. *Gooding*, (9 Barb., 371,) *Getty* v. *Hudson River R. R. Co.*, (6 How., 270,) furnish illustrations of the liberal view taken by the courts in favor of disregarding variances when the party has not been misled; in some of which the very nature of the relief was changed by the difference between the allegation and the proofs.

And in opposition to a possible suggestion, that although the court may disregard a variance when the proofs are given, they are not bound to receive proofs which will create a variance, the case of *Catlin* v. *Gunter*, (1 Kern., 368,) in the Court of Appeals, shows that the court are bound to receive the evidence when offered, if the variance to arise therefrom be not such as to leave the allegation unproved in its entire scope and meaning.

If these views are correct, and the variance would be immaterial if the declaration itself had contained the very words out of which the alleged variance arises, then I think it clear that when the alleged variance arises from the terms of the bill of particulars, the case is no stronger for the defendant.

The identity of the moneys, and the account upon which they were received by the defendant, remain the same under the proposed proofs as under the bill of particulars. The particulars are considered as incorporated in the declaration itself, as said in 14 J. R., 329, and 15 id., 222. And yet it has been held that a variance between the proofs and the bill of particulars is immaterial where it appears that the defendant has not been misled. (See 1 Taunt., 224; 1 Camp., 69, n.) If this last proposition be correct, and, I think, it is the true rule, then there is no occasion to refer to the provisions of the Code to show that the proof offered might be received; for the evidence was admissible, under rules existing before the Code was enacted.

In one aspect of the case there was no variance whatever between the proofs offered and the bill of particulars. The stock had, in fact, never been delivered. There had been an offer to

deliver it, but it was not accepted. If the words in the bill of particulars were taken as used for the purpose of identifying the stock and as having no other meaning, then there was no variance. They show that the stock on account of which the money had been paid was not in the plaintiffs' hands, but in the hands of the defendant, and so that the contract of sale had never, in fact, been fully executed by actual delivery and acceptance. It seems to me just to say, that the words of the bill of particulars are susceptible of this construction, and that they should have been so construed, unless the defendant showed that he was in fact misled by another more probable interpretation; and if the words, "which the defendant never delivered," be taken as used for the purpose of excluding the idea that the stock on account of which the moneys were received by the defendant was in the plaintiff's hands, then there was no variance.

It is only by treating these words as a specification of the grounds upon which the plaintiff sought to recover the money that any question of variance arises. I apprehend that it is not the office of a bill of particulars to state the grounds of a plaintiff's claim, but simply to point out the items and particulars which he claims, in such a manner as will enable the party to prepare for trial, and if the specification be ambiguous or susceptible of a double interpretation, the defendant should apply to have it made more definite and certain, or the plaintiff would be permitted to give any evidence not clearly excluded by the terms used, subject only to the duty of the Court to see that the defendant is not misled to his prejudice. And so, also, if a plaintiff do insert the grounds of his claim in his particulars, the court will so far hold him to that specification as to see that the defendant is not misled thereby, but that is all the effect which I think should be given to such a specification.

And again, in another aspect of the case, it seems to me that the proofs offered were within a fair construction of the bill of particulars, even if the words employed therein must be treated as a specification of the grounds of the plaintiff's claim.

The purchase was made by the plaintiff of stock to be issued; when issued, that stock would entitle the plaintiff to an aliquot part of the whole property of the association. The amount of that property would, of course, depend upon the real estate pur-

chased and the prices paid therefor. If the sale made by the defendant to the plaintiff was of a given number of shares in the association which, when issued, should entitle him to a fixed aliquot part or proportion of the property of the association, consisting in part of real estate for which the association should pay out in stock or money $16,000; and the shares finally issued and offered to the plaintiff entitled him only to the same aliquot part of the same real estate, and the association had been, by the defendant, required to pay $85,000 therefor, then the stock offered to the plaintiff was substantially different from the stock bargained for. This was a difference not in mere value; it was a difference in the very subject which the stock represented. Instead of offering to the plaintiff an aliquot part of the property of an association whose funds were invested in real estate at the rate of $16,000 for a given parcel, stock was offered in an association whose funds were invested in the same real estate at a rate of $85,000 for the same parcel.

The stock offered did not represent so much actual property as the stock bargained for would have done, had the representation made at the sale (as the plaintiff alleges and offered to prove) been carried out.

Nor in this view of the subject does the proof offered amount to a mere breach of promise by the defendant. The proof would have shown that, contrary to his representation made as an inducement to the purchase, he had so dealt with the association as to alter the material quality of the stock he sold. And that in truth the stock which the company thereafter issued, and which had no actual existence when the bargain was made, was not what it was represented and understood it should be. In this sense, the stock on account of which the money was paid was never delivered by the defendant.

There seems to me no warrant for saying that the reception of the evidence would in effect permit the plaintiff to change his cause of action from contract into tort. The offer was not to prove that the plaintiff was induced to enter into the contract by fraud, or false pretenses, and thereupon to claim damages as in an action on the case for deceit.

Nor have I deemed it necessary to consider the offer as in any degree impeaching the good faith of the defendant in making

the contract of sale. The offer is consistent with the most upright intentions in the minds of both parties at the time the contract was entered into. The offer, therefore, in this view, did not change the allegations, nor the statements in the bill of particulars in their entire scope and meaning, within the case of *Walter* v. *Bennett.* (15 N. Y. R., 250.)

Whether the subsequent acts of the defendant in view of what the plaintiff proposed to prove was a part of the terms of sale, must, if proved, be regarded as an intentional fraud upon the plaintiff or only as so operating upon the subject matter of the sale as to entitle the plaintiff to reclaim the money paid without necessarily involving such an intentional fraud, is not, in my judgment, material.

I feel constrained to concur in the result to which Justice PIERREPONT has arrived, viz.: that the order dismissing the complaint must be reversed and a new trial be ordered, costs to abide the event of the suit.

SLOSSON, J., dissented.

New trial ordered; costs to abide the event.

LAWRENCE, Plaintiff and Appellant, *v.* WOODS, Defendant and Respondent.

1. Where, during a term for years, created by a written and sealed lease, it is agreed, verbally, between lessor and lessee, that the lessee shall leave certain temporary buildings, put by him on the premises but not attached to the freehold, remaining on the premises at the expiration of the lease, (the lease having then several years to run,) and the lessor agrees that the lessee shall be discharged and freed from paying rent for the two quarters next ensuing such agreement as a consideration for so doing, and a suit is brought to recover said two quarters' rent, before the expiration of the lease; such agreement is no defense to the action, although said buildings are then on the premises.
2. Such an agreement, (not being in writing,) is void by the statute of frauds, as it is not to be performed within one year from the making thereof; and

also because it is for the sale of personal property of the value of over $50 and there was no delivery of any part of it, nor any payment of any part of the contract price.

(Before HOFFMAN, PIERREPONT, and MONCRIEF, J. J.)

Heard, December —, 1858; decided, March 12, 1859.

THIS is an appeal by the plaintiff, (William Beach Lawrence, Jr.,) from a judgment against him, entered upon a verdict in favor of the defendant, (John Woods,) rendered upon a trial had before Mr. Justice WOODRUFF and a jury, on the 18th of May, 1858.

The action is upon a sealed lease executed by both parties, dated September 1, 1854, by which the plaintiff demised to the defendant "all that inn or tavern called the Upper House, situate at the High Bridge, in the town of West Farms, county of Westchester, and State of New York, with the land around the same and the outbuildings thereon," &c., for the term of seven years from the 1st of August, 1854, at the yearly rent of $600, payable in equal quarterly payments in advance; which rent the defendant covenanted to pay accordingly.

The action was commenced in February, 1857, to recover for the quarter's rent ($150) commencing November 1, 1856, and also for the quarter's rent ($150) commencing February 1, 1857.

The defense set up in the answer is, that the defendant "erected temporary buildings or sheds" on the demised premises, "not attached to the freehold, for the better carrying on of his business," and afterwards, and about the 1st of November, 1856, being about to tear down and remove said temporary buildings, "the said plaintiff and this defendant entered into an agreement whereby this defendant sold and transferred to said plaintiff the said buildings, and said plaintiff then and there became the purchaser thereof, and upon the following considerations, that is to say: The said plaintiff did give to this defendant, and this defendant did accept, the use and occupation of said premises for the term of six months from the 1st day of November, 1856, to the 1st day of May, 1857, free and discharged from the amount of rent reserved for said premises in said lease, and the said plaintiff did then and there accept and this defendant give the said buildings as and for the rent of said premises for the time last hereinbefore mentioned."

At the trial, the lease was read in evidence. It contained a clause giving the right to reënter, on failure by the defendant to perform any of the covenants on his part; also, a covenant by defendant not to assign or underlet, and to occupy the premises as a public house or tavern.

Only one witness was examined: his testimony is as follows, viz.:

Thomas E. Jones, a witness for the defendant, testified: That he knew the parties; that he was at an interview between them in the fall of 1856; Mr. Lawrence came to Woods' store, and Woods asked Lawrence if he could not take those premises off his hands; Mr. Lawrence said he could not, but if Woods would give him a bill of sale of all his furniture and fixtures he would take them off his hands; on the second interview, Woods asked the same question; Lawrence said he would give him three months' rent free; the last time he came, Woods told him the roads were blocked up with snow, and it was impossible to do anything in the winter, and that he had spent a good deal of money on the premises; Woods asked him if he would not give him the place from 1st November to 1st May rent free; Woods told him of the expense he had been put to in fitting it up, erecting out-buildings, bowling alley, shooting gallery, &c.; Lawrence said if he would leave those out-buildings there, at the expiration of his lease, he would give him the six months' rent from 1st November, 1856, to 1st May, 1857; Mr. Woods accepted the offer, and told Mr. Lawrence he would leave them there in consideration of that; the out-buildings were bowling saloon, shooting gallery, ice-house and shed for horses; they were put up by Woods, who paid for them; I should not think they were permanent erections; neither shooting gallery, nor bowling saloon nor ice-house had any foundation; the shed had not; they are set just on the ground; Mr. Lawrence never called after that for the rent to my knowledge; nothing was said about a bill of sale to my knowledge at the last interview; plaintiff said, "If you will leave those buildings there, at the expiration of your lease, I will give you the six months' rent from the 1st day of November, to 1st May, in consideration of your leaving them there;" those are all the words.

The witness being cross-examined, testified as follows: The last and each interview took place in Pearl street, at Mr. Woods'

store in Pearl street; the premises are at High Bridge, Westchester county; the buildings were not in view of the parties; this conversation was in the fall of 1856; the third conversation was more than two weeks after the first; Mr. Woods said the roads were blocked up by snow and other obstructions; I should not think this conversation was later than October, 1856; I think it was in October, 1856; the occasion of the first conversation was Mr. Lawrence calling for his rent; the third time he called to know whether defendant would accept his (Lawrence's) proposition about giving a bill of sale; I think it was in October; I am as sure of that, as I am of anything else I have testified to; in the first conversation Lawrence said he would take a bill of sale of defendant's furniture and fixtures and cancel the lease, he would give up the rent; Woods had a tavern there; the buildings were appurtenant; in the third conversation Woods made a proposition; Woods asked Lawrence if he would not give him the place from 1st November to 1st May, free of rent; I cannot call to mind all that passed; those are the important facts which I remember; Lawrence said he would give him the place rent free till the 1st of May, in consideration of his leaving those buildings there; Lawrence used the words "in consideration;" did not hear Lawrence say the lease had several years to run; did not hear him say anything about bill of sale of furniture at the third interview; there was no writing executed; nothing more than words passed between the parties.

The direct examination being resumed, the witness further testified: I could not state what took place at the commencement of the first interview; I did not hear the first part, only the last part; I did not hear anything said on subject of rent at the first interview nor at any subsequent interview; those buildings were still there, when I was at the High Bridge two months ago.

And, thereupon, the parties closed their evidence, and the plaintiff's counsel prayed the Court to instruct the jury as matter of law:

1st. That the agreement set up was invalid under the statute of frauds:

Because, it was not in writing, and was not by its terms to be performed within a year. Which the Court refused to charge, and the plaintiff's counsel excepted.

2d. That under the same statute, the agreement not being in writing, it was not binding, because the articles were not within view of the parties at the time of the alleged agreement, which the Court refused to charge, and the plaintiff's counsel excepted thereto.

3d. That there was no accord and satisfaction proved; which the Court refused to charge, and plaintiff's counsel excepted.

4th. That the execution of the lease, the tenancy under it, and the accruing of the rent being proved, the plaintiff is entitled by law to a verdict for the amount claimed; which the Court refused to charge, and the plaintiff's counsel thereupon excepted.

And to the decision of the Court in respect to each of the points so presented by plaintiff's counsel, he then and there excepted.

The Judge then charged the jury as follows:

The theory of the defense is that the defendant, in the fall of 1856, was about to remove buildings, a bowling-alley, shooting-gallery, shed, &c., from the demised premises, and that Mr. Lawrence, to induce him to suffer them to remain, agreed to allow him the six months' rent from the 1st of November to the 1st of May. If any agreement of this description was made, the jury have to determine this question: Was it to apply to the six months in question or to the six months at the end of the lease, or ending the last 1st of May?

The Judge further charged the jury that they were at liberty to consider all the probabilities of the case, and whether it was probable that the six months' rent mentioned was the first six months or the last, when it should be known that the buildings remained at the expiration of the lease, and the manner in which the witness stated the conversation, and they would not overlook the discrepancies in his testimony. He had stated the conversation differently. The Judge further charged that if the buildings, as they are called, were not attached to the soil, but merely rested on the surface, and could be removed without disturbing the soil or anything attached thereto, and in order to prevent their removal the plaintiff agreed that if the defendant would suffer them to remain and leave them at the expiration of the lease, he would accept them in discharge of the rent in suit, and the parties both agreed to that arrangement, and the buildings have remained

there ever since, the plaintiff was not in a condition to maintain the action at this time and cannot recover.

But if the agreement was merely that for so leaving the buildings the defendant was to be allowed six months' rent at the end of the term, it constitutes no defense to this action. The plaintiff in such case would satisfy such an agreement by remitting the last six months' rent when the defendant had fully performed, and the plaintiff could see that the buildings were in fact left at the expiration of the lease.

To so much of the charge as is included in the last above paragraph but one, commencing "if the buildings" and ending "cannot recover," the plaintiff's counsel excepted.

The jury thereupon rendered a verdict for the defendant.

Judgment having been entered on the verdict, the plaintiff appealed from it to the General Term.

James W. Gerard, for appellant.

I. The whole case involved a mere question of law, assuming the evidence of Jones to be either as given on his direct or his cross-examination; and the cause should not have been submitted to the jury at all, except to direct them to render a verdict for the plaintiff for the amount of his demand, with interest.

II. The agreement attempted to be made out was clearly within the statute of frauds, and there never was a case where the propriety of that statute was more transparent than in this; an attempt to defeat a claim evidenced by writing and by seal, under a conveyance of real estate, by loose swearing to a verbal agreement, improbable, if not absurd in its very terms. (2 R. S., 317, 4th ed., § 3.)

1. If anything, it was an agreement not to be performed within a year. No bill of sale or present delivery of the articles was pretended, and they were not to be handed over until the expiration of the lease, which would not be until 1st August, 1861.

2. Or it was a contract for the consideration of $300, for the sale of goods and chattels of the value of more than $50 not in view, and of which there was no delivery. (*Shindler* v. *Houston*, 1 Comst., 261.)

III. The agreement pretended was indefinite and incomplete as to what goods were to be sold or delivered, and also as to

what rent was to be given up, and from its incomplete and indefinite character in judgment of law amounted to no agreement at all. It was impossible, at the end of the lease, for Mr. Lawrence to have gone to the premises and to have made a selection, good to pass title in law, of the specific things to which he was entitled. (7 Wend., 404; 14 id., 31; Pars. Merc. Law, pp. 48, 49, p. 48, note 2.)

The things to be given up, and which six months' rent, the first or the last six months of the lease, rendered the contract uncertain.

IV. The whole charge of the Judge was based upon a state of facts set up in the answer as important, but of which not one particle of proof was given—that is, "that the defendant was about removing the fixtures from the premises when the pretended agreement was made." The Judge confounded the answer with the evidence. The exception, therefore, to the part of the Judge's charge, relating to this matter, was well taken.

V. A written lease can only be surrendered in whole or in part by an agreement in writing, signed by the parties. The evidence of Jones, if he proves anything, proves a surrender of the lease for six months while the lessee remains in possession, and a new agreement for a six months' lease, all by parol.

VI. The covenant in the lease to pay rent can only be satisfied by one of three things: 1st, by actual payment; 2d, by a release; 3d, by an accord and satisfaction. The agreement set up, amounts to neither. (*Bump* v. *Phœnix*, 6 Hill, 308.)

There was no actual payment; there was no release, because the rent was not yet due; there could be no accord and satisfaction, because there was no delivery.

VII. If a clear, explicit agreement was proved, such agreement would be no bar to this action, not being either payment or a release, or an accord and satisfaction. The defendant's only remedy would be to sue the plaintiff for a breach of the agreement, leaving each party to his right of action on their respective mutual promises. (19 Wend., 516; 23 id., 342.)

VIII. The verdict is against the law and the evidence, and a new trial should be granted.

J. R. Marvin, for respondent.

I. The agreement proved in this case to have been made by the parties in this action was, in all respects, valid and binding in law unless it was within the statute of frauds.

II. The agreement was not within the statute of frauds, for the reasons:

1. It was not an agreement that by its terms was not to be performed within one year from the making thereof. It was to be performed, and was, in fact, performed, at the time of making the agreement. The rent in suit was forgiven, and the outbuildings became the absolute property of the landlord at the time. The tenant parted with all his interest in the buildings which, at best, was a qualified interest, to wit, the right of removal during the term of the lease.

2. Admitting that the parties intended that the buildings should remain the property of the tenant until the expiration of the lease, then the agreement was not within the statute. It might have been fully performed within the year by a cancellation of the lease within that time by mutual consent, or by the reëntry of the landlord, as provided by the lease. (10 J. R., 244; 10 Wend., 426; 15 id., 336; 5 Hill, 200; 13 Barb., 493; Skinner, 353; 3 Burr., 1278; 5 Barb., 469.)

3. Admitting that the tenant was to perform his part of the agreement on the 1st day of May, 1861, then the agreement was not within the statute, because the landlord performed his part of the agreement at the time of the making thereof, to wit: he canceled the rent in suit.

The statute does not apply when all that is to be performed by one party, is to be performed within a year from the making of the contract. (*Bracegirdle* v. *Heald*, 1 Barn. & Adol., 727; *Donellan* v. *Read*, 3 id., 899; *Cherry* v. *Hemming*, Court of Ex., 1849; 10 Me., 476; 10 Gil. & Johns., 404; 1 Ga., 348; 7 Ala., 161; 4 Md., 476; 3 Mo., 241; 13 Barb., 493.)

BY THE COURT—PIERREPONT, J. If the defendant has any defense at all in this case, it rests entirely upon the verbal contract attempted to be proven by Jones, who states:

"Plaintiff said, if you will leave those buildings there at the expiration of your lease, I will give you the six months' rent

from the 1st day of November to 1st May, in consideration of your leaving them there; those are all the words."

The witness says, this was the rent from November 1, 1856, to February 1st, 1857, and that the agreement was made in October, 1856; and that he is as sure that it was made in October, 1856, as of anything he has testified to.

As there is no evidence of any agreement about the matter of the temporary buildings except the testimony of this witness; if any such agreement was made at all, it was the one above stated, and was made in October, 1856; consequently it was an agreement made before any part of this rent fell due, (although payable in advance.) There was no delivery of anything, no bill of sale, no release of rent to become due in future, no writing and no payment. And "the expiration of your lease," about which the witness speaks, does not happen by its terms until August 1st, 1861, and there is no intimation in the evidence that any delivery of these buildings was contemplated until the expiration of the lease. There is no suggestion in the evidence that the defendant had a thought of removing the buildings until the end of the term, or that any such consideration moved either party to the alleged agreement. If any contract was made of the nature stated by the witness, it is very singular that there was no written memorandum of it, and serves to show how salutary is the statute of frauds, which was not only framed to prevent frauds and perjuries, but also to guard against the mistakes, misunderstandings, forgetfulness and misapprehensions of honest men.

The agreement which this witness relates was not one to be performed within one year, and is void by the statute of frauds.

If, moreover, it is claimed that the buildings were personal property, then both they and the rent amounted to more than $50, and as the rent was not due, and as there has been no payment or delivery, and no writing, the alleged contract is void under the 3d section of the statute of frauds. (*Shindler* v. *Houston*, 1 Comst., 261.)

The rent accrued under the covenants of a lease under seal; since due, there has been no release or agreement to release, and no payment, nor has there been any accord and satisfaction. All that is shown for the purpose of defeating the covenants of this sealed instrument is a verbal promise made by the plaintiff in

October, 1856, that if the defendant would, at the expiration of the lease in August, 1861, leave the buildings on the premises, he might have the rent accruing in November, 1856, and February, 1857, as a consideration for so doing. Such verbal agreement is not sufficient to prevent the plaintiff's recovery in this action. (*Delacroix* v. *Bulkley*, 13 Wend., 71.)

New trial, with costs to abide the event.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs and Respondents, *v.* THE PHŒNIX BANK OF THE CITY OF NEW YORK, Defendants and Appellants.

1 The decision of a legally constituted Board of State Auditors, upon a claim preferred by an individual against such State, made under the authority of the Constitution and laws of the State by which such board is created, is alike conclusive upon the State and such claimant, where such Constitution and laws confer on such board power and authority to examine and adjust all claims of the character of that so preferred; and to examine the claimants and witness upon oath; to issue subpœnas to compel the attendance of witnesses before them and to enforce obedience to such subpœna by attachment; to set off any legal or equitable demand of the State against such claimant; to adjourn from time to time; and require such board to keep a record of its proceedings and decide upon competent testimony.

2. After a claim against such State, within the jurisdiction of such board to examine and adjust, has been heard before such board according to the laws prescribing its powers and duties; and has been determined in favor of such claimant, and has been paid by an officer of such State, (acting in its behalf,) as required by law, it cannot be recovered back, where no fraud has been practised or intended by such claimant, by the means which he employed to assert and establish his claim before such board; merely upon the grounds, that upon the merits nothing was due from the State to the claimant; and that the decision of such board was made in ignorance of facts which, if proved, would have established that nothing was due.

3. The decisions of such a board upon matters within its jurisdiction, in cases free from fraud, are conclusive; unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.

4. A State is competent to consent to be sued, and may grant such consent upon such terms as it may think just.

5. A State which, by the authority of its Constitution, creates by statute a board of its officers of State, with the powers before stated, and by such statute enacts that, when any claim shall be allowed by such board, (such claim being within its jurisdiction,) and the amount due shall have been settled by such board, the claimant "shall be entitled to a warrant drawn by the Auditor-General upon the State Treasurer therefor forthwith," thereby consents to submit to the investigation and decision of claims against her, before such tribunal; upon the terms prescribed by such Constitution and laws, and can claim no exemption from the rule which, in like cases, is applicable to natural persons.
6. Although the laws of such State make it the duty of the Attorney-General to appear in behalf of the State before such board, when they shall sit to audit claims against the State; and to that end require the board to give him timely notice of the time and place of their meeting to audit such claims; the fact that he did not appear on the hearing of a claim which such board audited and allowed, and which was paid by reason of being so audited and allowed; will not give the State the right to recover back the money so paid; nor aid its claim to a restoration of such money, espeially when it is not made to appear that the Attorney-General did not have timely notice of the meeting of the board to audit such claim.
7. Notice to him is not essential under such statutes, to confer jurisdiction on such board to audit and settle claims.
8. It not having been found in the present case, that the defendants (claimants whose claim had been audited, settled and paid) were guilty in fact or intent of any fraud in their proceedings before the Board of State Auditors of the State of Michigan to establish their claim against that State, it was

Held, That a judgment against them in favor of the State, for the amount of a claim made by them against the State, and paid by the State on being audited and settled by such board, was erroneous and must be reversed.

(Before Bosworth, Ch. J., and Hoffman and Moncrief, J. J.)

Heard, January 4, 5; decided, March 12, 1859

This action comes before the General Term on an appeal by the defendants from a judgment entered against them at Special Term, in favor of the plaintiffs, on the 3d of July, 1857, for $42,152.97. It was tried in April, 1857, before Mr. Justice Hoffman, without a jury.

The action was brought to recover back from the defendants the sum of $35,603.74, paid to them by the plaintiffs on the 4th of December, 1854, and the interest thereon. That sum was so paid to the defendants as owners of a claim against the plaintiffs to that amount, which had been assigned to the defendants by the President and Directors of the Phœnix Bank—an old char-

tered institution, whose charter expired on the 31st of December, 1853.

It was so paid in pursuance of a decision or award of the Board of State Auditors of the State of Michigan, to which board the defendants had presented their claim against the State in May, 1854.

Section 31 of Article 1 of the Constitution of the State of Michigan, which took effect on the 1st of January, 1851, (and is found in the Michigan Revised Laws, of 1857, p. 54,) reads thus: (See Michigan R. Laws of 1857, pp. 83, 80, 81, § 19 of schedule.)

§ 31, Art. 1. "The Legislature shall not audit nor allow any private claim or account."

Article 8, section 4, (p. 63, id.,) reads thus:

§ 4, Art. 8. "The Secretary of State, State Treasurer, and Commissioner of the State Land Office, shall constitute a Board of State Auditors to examine and adjust all claims against the State, not otherwise provided for by general law." * * *

By an act of the Legislature of the State of Michigan, approved April 7, 1851, (Laws of 1851, p. 173,) sections 44, 46 and 47 of the Revised Statutes of 1846, were so amended as to conform to and carry out the constitutional provision for the creation of a Board of State Auditors, and as thus amended sections 44 and 47 read as follows: (See Mich. Revised Laws of 1857, pp. 145 and 146.)

"§ 44. The Secretary of State, State Treasurer, and Commissioner of the State Land Office, shall constitute a Board of State Auditors, and as such they shall have power, and it shall be their duty, annually, and at any other time in their discretion, to enter into a full settlement and final adjustment with every officer and agent of this State of all debts, credits, claims and demands of whatsoever description, between such officer or agent and this State, and it shall also be their duty to examine, adjust and settle all other claims and demands against this State, which may be presented by any other person or persons, the settlement of which is not already provided for by law; but such board shall not allow and audit any claims against the State unless the same shall be established by competent testimony; and said board shall keep a record of its proceedings, which shall contain each claim presented, and its items, an abstract of the evidence taken, and the

amount adjusted and settled in favor of the person or persons presenting the claims, or in favor of the State; and any member of said board shall have power to administer oaths to any person or persons presenting claims, or to witnesses; to examine the person or persons under oath; to issue subpœnas to any part of the State against witnesses, and if any witness or witnesses fail to appear in pursuance thereof, and the fees provided herein shall have been paid or tendered, to issue attachments to compel their attendance; to set off any legal or equitable claim against such person or persons in favor of the State, upon proof of the same, and to adjourn from time to time." * * * *

"§ 47. If, upon the allowance of any claim, or upon any balance being struck upon any settlement made in pursuance of this chapter, it shall appear that the State is indebted to the party with whom the settlement is made, or to whom such claim shall be allowed, he shall be entitled to a warrant drawn by the Auditor-General upon the State Treasurer therefor forthwith."

Section 2 of a statute of that State, approved January 26, 1848, (Laws of 1848, No. 12, § 2, p. 9,) reads thus:

"§ 2. It shall be the duty of the Attorney-General to appear in behalf of the State, before the Board of State Auditors, when they shall sit to audit claims against the State, and to that end, said board shall give said Attorney-General timely notice of the time and place of their meeting to audit such claims." (See I Mich. R. L. of 1857, p. 147, [210,] § 2.)

Section 1 of "Schedule," in the Constitution of said State, (1 R. L. of Mich., p. 77,) reads thus:

"SCHEDULE," "§ 1. The common law and the statute laws, now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the Legislature."

The evidence tends to show that the claim of the Phœnix Bank was presented to the Board of State Auditors of the State of Michigan, in May, 1854.

The said Board allowed the claim on the 2d of December, 1854. and on that day entered upon the record of its proceedings, in relation to said claim, the following, to wit:

"Claim of the Phœnix Bank, New York, against the State of Michigan, for an advance of $16,400, on State bonds, delivered

to John Norton, junior, cashier of the Farmers' and Mechanics' Bank, Detroit, by order of Governor Mason, for the use of said State, March 13, 1838, and the interest thereon. The Board decided that, upon the evidence produced, said Phœnix Bank was justly and equitably entitled, for principal and interest on said claim, from March 12, 1838, to December 2, 1854, to the sum of $35,603.74."

That sum, in pursuance of such decision, the plaintiffs paid to the defendants, on the 4th of said December, and it is to recover back the sum so paid that this action is brought.

The Attorney-General did not appear before the said Board of State Auditors, in relation to said claim, while it was pending before said Board: whether he was notified to appear, was not found by the Judge.

The Judge found a series of facts, (covering some eleven printed pages,) stating in detail the transactions in which the claim originated, the evidence produced before the said Board of State Auditors, and certain transactions between the defendants and third persons (in relation to said claim, and which third persons are alleged to be the actual debtors, in respect of the matter thereof;) of which latter facts he also found that the members of said Board were severally ignorant during the proceedings before the Board, and until after payment of the sum allowed was made, and which latter facts he held were sufficient, of themselves, to extinguish any and all claims of the defendants upon the State, even if they, or their assignors, would otherwise have had any.

He also held, *inter alia*, as matter of law, that neither the plaintiffs nor their assignors ever had any just or valid claim against the State. His 14th conclusion of law is as follows, viz.:

"14th. Although the Board of State Auditors had, by the Constitution and laws of Michigan, power to examine and adjust and audit any claim against the State not otherwise provided for by general law; and although said Board did examine and adjust, audit and allow the claim of the Phœnix Bank, and the State did thereupon pay the money; yet the award is nothing higher than an adjustment of an account or claim by an agent constituted to examine it."

This decision was excepted to. The other matters of fact found, and conclusions of law stated, it is deemed unnecessary to

recapitulate, as it was not found that the claim was presented in bad faith, or that any fraud or artifice was practised or intended by the defendants, in any of their proceedings before the Board of State Auditors.

The other facts in the case, and the questions arising upon them, are not stated, as they were not considered, by the Court at General Term.

The Judge decided that the plaintiffs were entitled to recover back from the defendants the sum so paid as aforesaid by the former to the latter, amounting to $41,959.39. Judgment was entered thereupon in favor of the plaintiffs against the defendants; and from that judgment the present appeal was taken by the defendants.

Edgar S. Van Winkle and *Francis B. Cutting*, for defendants and appellants.

I. No authority of the State of Michigan for beginning and prosecuting this action has been shown.

II. These defendants are not liable at all. If any party is liable, it is the trustees of the old Phœnix Bank. The defendants here were purchasers, in good faith, of a claim against the State of Michigan. The State paid it to them without any act on their part, and the money cannot be recovered back from the defendants.

The defendants had no existence until the 1st January, 1854.

They could not, therefore, have been participants in any acts or proceedings of any person or body prior to that time.

III. Even if the old Phœnix Bank were defendants, the award of the Board of State Auditors could not be reëxamined in this Court.

1. Because the matter is *res adjudicata*, only impeachable for fraud in obtaining the judgment. (*Kingsland* v. *Spalding*, 3 Barb. Ch., 341; *Vail* v. *Vail*, 7 Barb., 226; *Hopkins* v. *Lee*, 6 Wheat., 109;) and;

2. Because being a judgment, and the money collected under it, no action will lie to recover it back. (*White* v. *Merritt et al.*, 3 Seld., 352; 2 Smith's Leading Cases, 237, and note on 239.)

3. Because there is no valid proof of fraud.

The prayer of the complaint is,

a. That defendants may be compelled to refund to plaintiffs the amount paid to them by Board of State Auditors.

b. That the allowance of said claim by said Board of State Auditors, and the entry thereof by said Board, may be declared to be fraudulent and void as against the plaintiffs, and that the same may be annulled and set aside.

The first part of the prayer can only be granted in case the second is allowed.

The second cannot be granted unless fraud, as alleged, has been proved.

The complaint does not proceed on the ground of mistake for relief, but of fraud. For error the only relief is to falsify and surcharge, not to set aside. It can be avoided only upon the ground of fraud. (2 Danl. P., 764; *Bruen* v. *Hone*, 2 Barb., 592.)

The judgment of the Board of Auditors could be set aside only for fraud. (*Consequa* v. *Fanning*, 3 Johns. Ch., 595.)

The Board of State Auditors, consisting of the Secretary of State, Treasurer, and Commissioner of State Land Office, constituted a special tribunal having jurisdiction of this claim. (See Laws of 1846, p. , and of 1851, p. 473; Const. of Mich., art. 8, § 4, p. 60.)

The Board was a quasi-judicial body, with power to hear and determine claims against the State. (*Ex parte Rogers*, 7 Cow., 526; *Van Steenbergh* v. *Bigelow*, 3 Wend., 42; *Martin* v. *Mott*, 12 Wheat., 19; *Walker* v. *Deveraux*, 4 Paige, 229, 250; 3 Barn. & Ad., 271.)

Their power and duty is to examine, adjust and settle claims and demands against the State which may be presented by any person, the settlement of which is not otherwise provided for by law. They shall require competent testimony, keep a record of its proceedings, which shall contain, &c. May administer oath; can examine the claimant and other persons under oath; issue subpœnas and attachments; set off legal or equitable claims in favor of the State, and their allowance of a claim entitled a party to payment. (See act of April 7, 1851.)

This is a complete judgment after trial. No appeal lies from the board.

Its decision of the claim of the Phœnix Bank, is final and cannot be impeached collaterally, except upon proof by the State

that a valid and equitable defense existed, which it was prevented from setting up by the fraud of the defendants, without negligence or other fault on the part of the State. (*Vilas* v. *Jones*, 1 Comst., 282.)

Its adjudication is more conclusive than an award by private arbitrators, because the Board is appointed by the State, without any selection by the Phœnix Bank. (*Ex parte Rogers*, 7 Cow., 526.)

But even treated as of equal and no greater effect than an ordinary award, the merits of the claim cannot be reëxamined; it can only be impeached by reason of partiality or corruption of the arbitrators. (*Butler* v. *Mayor of New York*, 1 Hill, 489; *McKinney* v. *Newcomb*, 5 Cow., 425.)

Whether this is called an award or a judgment, matters but little, as neither is impeachable except for fraud. This claim was within their jurisdiction, and is therefore not triable again here. It was a claim.

Webster defines a claim to be "a demand of a right or a supposed right; a calling on another for something due or supposed to be due, as a claim of wages for services. A claim implies a right or supposed right in the claimant to something which is in another's possession or power. A claim may be made in words, by suit, or by other means."

Richardson says, "It is to challenge, demand or pretend a title to."

It was argued in the Court below that the jurisdiction can only relate to claims on contracts to which the State is bound legally. That was the very question to be tried by the Board of Auditors, whether the State was bound. That was the very foundation of the jurisdiction. (*Britain* v. *Kinnaird*, 1 Brod. & Bing., 432; *Rankin* v. *Hoyt*, 4 How. U. S. R., 327; 12 Pick., 572, 583.)

The assent of the Legislature may be signified in various ways. They may do it directly, or they may delegate the power to the Board of Auditors, or any single officer, Governor, Attorney-General or Auditor

Whether the alleged contract was one to which the State was a party, was the very question presented and argued before the auditors. (Ex. 1 and 2 in commission; see the 2 Consts. of Mich. and the 2 laws of Board of State Auditors; Laws of Mich., vol. , p. .)

The Courts of New York cannot overhaul and reëxamine the question whether the law authorized the acts of Mason—whether the Phoenix Bank dealt with him on the faith of the law, or of the bonds—whether the money actually went into the State treasury. The board having jurisdiction of the subject has adjudicated upon and allowed the claim.

If this claim had been acknowledged by a law—the highest act of a State—then by the Constitution, the Board of State Auditors could have had no jurisdiction. (See Const. of Mich., art. 8, § 4.)

The action of the Board of State Auditors was a judicial act, final and conclusive.

The State of Michigan being plaintiffs, seeking equitable relief, is subject to the same rules and equities as ordinary suitors, is bound to use the same diligence, and is chargeable with like notice, and affected by *laches* to the same extent as private suitors. (*United States* v. *Barker*, 4 Wash. C. C. R., 464; *S. C.*, 12 Wheat., 559; *Bank of United States* v. *The United States*, 2 How., 711; *United States* v. *Bank of the Metropolis*, 15 Peters, 377; *Dixon* v. *United States*, 1 Brock. R., 177; *United States* v. *Wilder*, 3 Sum., 308; *New Orleans* v. *The United States*, 10 Peters, 662, 917; *Darnington* v. *Bank of Alabama*, 13 How., 12; *Briscoe* v. *Bank of the Commonwealth*, 11 Peters, 257.)

It cannot be avoided for error of law, for there is no appeal; none from the Board of State Auditors to the Superior Court of New York. The decision, if erroneous, is nevertheless the law of the case. (*Mowatt et al.* v. *Wright*, 1 Wend., 355; *Mitchell* v. *Bush*, 7 Cow., 185; *McKinney* v. *Newcomb*, 5 id., 425.)

Neither error of law nor of fact will avoid an award unless the error is apparent on the face of the award. (Watson on Awards, 159.)

It cannot be avoided for error of fact; a decision of a competent tribunal where the facts were in issue, or might have been in issue, is not reviewable elsewhere. (*Kingsland* v. *Spalding*, 3 Barb. Ch., 341; *Vail* v. *Vail*, 7 Barb., 226; *Bruen* v. *Hone*, 2 Barb., 586; *Hopkins* v. *Lee*, 6 Wheat., 109; *United States* v. *Nourse*, 9 Peters, 8; *Voorhees* v. *The Bank of United States*, 10 Peters, 478, 449; *Embury* v. *Conner*, 3 Comst., 511; See also *United States* v. *Arredondo*, 6 Peters, 691.)

A decree of a competent Court of the highest jurisdiction is final and conclusive. (*Penhallow* v. *Doane's Administrators*, 3 Dallas, 54, 85.)

The debt itself cannot be inquired into, but only fraud in procuring the judgment. It cannot be tried over again by this Court. It will, at the utmost, only receive proof of fraud affecting the defendants, which, if proved, would be sufficient to overturn the award.

That the proofs given before the Board of Auditors were sufficient, is beyond review.

That the testimony before them was competent, is beyond review here.

Neither of the arbitrators or Judges has sworn, that if he had known the new facts now proved it would have altered his award. (See Kyd on Awards; *Ives* v. *Medcalfe*, 1 Atk., 64; *Tittenson* v. *Peat*, July 1, 1747, 3 Atkyns, 529.)

This proceeding was *in invitum*. It was no compromise or bargain, it was a suit. The Attorney-General represented the State; if not present, it was the plaintiff's fault or misfortune.

The Bank of River Raisin and Bank of State of Michigan were both within the jurisdiction. The deed of 1840 was on record.

The fraud to avoid must be an active and positive fraud not constructive, that is, if based on an adverse proceeding.

There must be circumvention. (See *Brinckerhoff* v. *Lansing*, 4 J. C. R., 70.)

Mere silence in regard to a fact within the knowledge or reach of both parties is not a fraud.

A Court of Equity will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. (*Creath* v. *Sims*, 5 How. U. S. R., 192.)

Money paid under a judgment cannot be recovered back in a new action. (*White* v. *Merritt & Wheaton*, 3 Seld., 352; *Marriot* v. *Hampton*, 7 T. R., 269; *S. C.*, in 2d Smith's Leading Cases, 237, and note on page 239; *White* v. *Ward & Aylesworth*, 9 Johns., 232; *Loomis* v. *Pulver*, id., 244; *Loring* v. *Mansfield*, 17 Mass. R., 394; *Homer* v. *Fish et al.*, 1 Pick., 435; *Carter* v. *Canterbury*, 3 Conn., 456.)

Equity will not grant relief in such a case. (*Le Guen* v. *Gouverneur*, 1 Johns. C., 436; *Smith & Mead* v. *Lowry*, 1 Johns. Ch.,

320; *Campbell* v. *Morrison*, 7 Paige, 157; *Clarke* v. *Dutcher*, 9 Cow., 674.)

"Money paid with the full knowledge of facts or the means of knowledge cannot be recovered back, on the ground that the party supposed he was bound in law to pay it, when in truth he was not." (*Mowatt et al.* v. *Wright*, 1 Wend., 355; *Elliott* v. *Swartwout*, 10 Peters, 138, 153.)

For fraud which the party litigant knew of or could have known of, or ought to have known of, even a Court of Equity will not open a judgment or award. (*Le Guen* v. *Gouverneur*, 1 Johns. C., 496, and cases there cited.)

There is nothing new in this case, nothing that the State could not have known at the time.

The mere taking of the deed from Stewart alters no rights. The trustee is changed—that is all; everything else the State knew.

A bill of review will lie, it is true, on newly discovered evidence, but only in cases and upon grounds where a new trial at law will be allowed.

The judgment at Special Term should be reversed, with costs.

J. L. Jernegan, for respondents, (the plaintiffs,) argued (among other points) that,

I. The payment of the claim by the State, after its allowance by the Board, does not bar its recovery in this action.

1. The payment was made by the State in ignorance of material facts, and the money can therefore be recovered back. (*Connecticut* v. *Jackson*, 1 Johns. Ch., 13; *Stoughton* v. *Lynch*, 2 id., 209; *Mowry* v. *Bishop*, 5 Paige, 98; *Boyer* v. *Pack*, 2 Denio, 107.)

II. The Board of Auditors had no adequate means of discovering these facts, and their ignorance of them was not the result of negligence.

1. But whether they had adequate means of knowledge or not, it is sufficient, especially in view of the fact that they were acting as officers of State, that they had no actual knowledge of these facts.

(*a*.) According to the rule, as now established, the question is, whether the party had actual knowledge of the facts; and the possession of means of knowledge is to be regarded only as evi-

dence to be left to the jury, bearing on the question of actual knowledge. (*Bell* v. *Gardiner*, 4 M. & G., 11, 21, per TINDAL, Ch. J.)

(*b.*) Such means of knowlege in the possession of an officer of government, while acting in his official capacity, is not permitted to have the same weight as in the case of an individual acting in his own right. In *Hunter* v. *United States*, (5 Pet., 173,) it was shown, that a paper showing the claim of the government, was in the possession of the government when the money was paid. Yet the Court held that that fact could not prejudice the government, and say: "It might be dangerous to give the same effect to a voluntary payment by an agent of the government, as if made by an individual in his own right. The concerns of the government are so complicated and extensive, that no head of any branch of it can have the same personal knowledge of the details of business, which may be presumed in private affairs."

2. These propositions apply with still greater force to any presumption of knowledge in the State, founded on communications made to any other of its officers, beside those composing the Board of Auditors.

3. The money can be recovered back on the ground that its payment was obtained by fraud.

III. Even should it be held that the proceedings of the Board of Auditors, were judicial in their character, they would not bar a recovery in this action.

1. The action of the Board was *ex parte*, and cannot be therefore pleaded as an estoppel to the State.

The act defining the duties of the Board, contains no provision for making the State a party to the proceedings; it provides for no process against the State, or notice to any officer of the State, and it does not make it the duty of any officer to attend on the part of the State, or protect the rights of the State. Such a proceeding, where one of the parties only is represented, and no notice, actual or constructive, is given to the other, is *ex parte*, and can in no case estop the party against whom it is. This doctrine is elementary. (*Woodruff* v. *Taylor*, 20 Verm., 65; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn., 607; *People* v. *Kingston and Middletown Turnpike Co.*, 23 Wend., 193, 210.) In the first of these cases, the Court say: "A proceeding professing to de-

termine the right of property, where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded any where as the judgment of a Court." In the case in Wendell, which was a *quo warranto*, claiming a forfeiture of the defendants' charter, for a non-compliance with its provisions in relation to the mode of constructing their road, the defendants insisted that the State was estopped by the report of the commissioners appointed by the Governor to view the road and report whether the same was completed according to the requisitions of the charter. A report by these commissioners that the road had been thus constructed, was made by the charter a condition precedent to the issuing of a license by the Governor authorizing the Company to take toll. Such a report had been made to the Governor, and the license issued. But the Court held that these proceedings did not operate as an estoppel; "the proceeding," say the Court, "is *ex parte* in respect to the people; it does not contemplate a contested trial, where the whole matter would be brought out for discussion and adjudication."

2. As the State was not represented in the proceedings before the Board, it was the duty of the defendants to state all material facts within their knowledge, necessary to inform the judgment of the Board; and their omission to do so, and their concealment of material facts within their knowledge, was a fraud, and renders the decision thus fraudulently obtained, a nullity. (*Loomer* v. *Wheelwright*, 3 Sandf. Ch., 135; *Borden* v. *Fitch*, 15 Johns., 121; *Andrews* v. *Montgomery*, 19 Johns., 164.)

The case of *Loomer* v. *Wheelwright*, was a bill filed to set aside a decree of foreclosure. The mortgagee had obtained the decree by default, against an infant by default, after the mortgage had been satisfied with the knowledge of the mortgagee. The mortgagee withheld from the defendant, and from the Court, all information in relation to the satisfaction of the mortgage, and the Vice-Chancellor held that for this reason, the decree was obtained by fraud, and should not be permitted to stand.

3. Even admitting all the defendants claim, that the decision of the Board of Auditors is clothed with all the attributes of the judgment of a Court of competent jurisdiction, this case combines

2. The cases in this State holding that the decisions of the Canal Appraisers are conclusive, are justified by the statute, which all the elements which are necessary, according to the long established principles of Courts of Equity, to entitle the plaintiff to be relieved against it; it being contrary to good conscience that the defendants should reap the fruits of it, and the plaintiffs having been prevented from availing themselves of a good defense by the fraud of the defendants, and by ignorance on the part of the plaintiffs of the facts, at the time of the trial and the payment of the money, without fault or negligence on their part. (*Marine Ins. Co.* v. *Hodgson*, 7 Cran., 332; *Countess of Gainsborough* v. *Gifford*, 2 Peere Williams, 424; *Williams* v. *Lee*, 3 Atk., 223; 2 Story's Eq., § 887, and authorities there cited; *Reigal* v. *Wood*, 1 J. C. R., 402; *McDonald* v. *Neilson*, 2 Cow. R., 139; *Duncan* v. *Lyon*, 3 J. C. R., 351; *Shottenkirk* v. *Wheeler*, id., 275; *Dobson* v. *Pearce*, 2 Kern., 156.) And the fact that the proceedings against which relief is sought, took place in another State, is immaterial. (*Dobson* v. *Pearce*, *ubi supra*, 169.)

IV. The authorities cited in opposition to our view of the effect of the allowance by the Board, have, we submit, no application in this case.

1. The general principle stated by one of the learned Justices in *United States* v. *Arredondo*, (6 Peters, 691,) "that where power or jurisdiction is delegated to any public officer, or tribunal, over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred," need not be controverted. The important limitation of this principle is stated in the next sentence: "The only questions that can arise between an individual claiming a right under the act done and the public or any person denying its validity are, power in the officer, and fraud in the party." The very question to be determined here, is a question of power in the Board. Was that power ministerial or judicial, a mere power to settle, adjust and pay accounts, or a power to render a final and conclusive judgment against the State? And even were the question of power determined against us, the other question still remains, was there fraud in the party?

makes the State a party to all the proceedings by requiring one of the Canal Commissioners to attend in person or by agent on behalf of the State, and employ counsel and procure the attendance of witnesses, if necessary, (Laws of 1836, ch. 287, § 5,) provides for an appeal from the decision of the appraisers, (Laws of 1829, ch. 368, § 3,) and expressly provides that the decision on that appeal "shall in all cases be final and conclusive." (Id.)

3. In the case of *Rankin et al.* v. *Hoyt*, (4 How. U. S., 327,) no question was made as to the conclusiveness of the appraisement, and the case is, in other respects, easily distinguishable on the ground, that the importer had a right to be present and appeal from the decision.

V. The defendants, having become assignees of this claim in 1854, took it *cum onere*, subject to all the equities which existed at the time of the assignment, and to all the defenses which existed against the assignor. (1 Parsons on Contracts, 195, and authorities there cited.)

By the Court—Bosworth, Ch. J. The important questions arising on this appeal, are:

1. What is the force and effect of a decision by the "Board of State Auditors of the State of Michigan," upon a claim within their jurisdiction; that it is just, and that a sum which they specify is justly due from that State to the claimant; and of actual payment, by the proper officer of the State, in pursuance of such decision, of the sum so decided to be due?

2. Can the money so paid be recovered back on the mere grounds that, upon the merits, no sum was due, and that the Board made their decision ignorant of certain facts, upon which, if they had been proved, their decision would or should have been that nothing was due from the State; no fraud having been practised by the claimants, by the means which they employed to assert and establish their claim before such Board?

It was conceded, on the argument of this appeal, not only that the Board of State Auditors had jurisdiction to entertain, examine into and determine this claim, but also, that under the Constitution and statutes of the State of Michigan, this Board had the sole and exclusive jurisdiction to examine into and decide it.

By the act of April 7, 1851, amending sections 44, 46 and 47 of chapter 12 of the Revised Statutes of 1846, this Board was clothed with the "power," and it was made its "duty," "to adjust and settle all claims" (other than those otherwise provided for by law,) "against this State which may be presented."

By this statute, the Board is required to act, in allowing a claim, upon "competent testimony;" and to "keep a record of its proceedings." Power is given "to administer oaths to any person or persons presenting claims, or to witnesses; to examine the person or persons under oath; to issue subpœnas to any part of the State against witnesses, and if any witness or witnesses fail to appear in pursuance thereof, and the fees provided herein shall have been paid or tendered, to issue attachments to compel their attendance; to set off any legal or equitable claim against such person or persons in favor of the State, upon proof of the same, and to adjourn from time to time." * * *

It also declares that the claimant, whose claim shall be allowed by the Board, "shall be entitled to a warrant, drawn by the Auditor-General upon the State Treasurer therefor, forthwith."

Another statute makes it the duty of the Attorney-General to appear before the said Board, in behalf of the State, and represent the State and its interests on such proceeding.

It is quite obvious that this Board was vested with powers, in their nature judicial. It was authorized to hear and determine certain civil controversies between the State and individuals. Power was given to it to compel the attendance of witnesses, to administer oaths to them, to adjourn from time to time, and it was required to act upon competent testimony, and to keep a record of its proceedings. The law provides for carrying its decisions into effect. A determination against the State, that it justly owes to the claimant a specified sum, is to be followed by a "warrant" for that sum upon the "State Treasurer," (one of the members of such Board,) drawn by another State officer, viz.: the Attorney-General, and to be drawn forthwith.

The creation of this Board is authorized by the Constitution of the State of Michigan. There is, therefore, no question as to the validity of the statute which defines its powers and duties.

Its proceedings and decisions are as truly judicial in their nature as those of any special tribunal constituted by competent

authority to hear and decide controversies between the adverse parties thereto, and not proceeding according to the course of the common law, or in the mode usual in Courts of Chancery possessing original and general equity jurisdiction.

In *The United States* v. *Arredondo and others*, (6 Peters, 691–729,) Mr. Justice STORY declares it to be "an universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, (1 Cr., 170, 171,)—legislative, (4 Wh., 423; 2 Peters, 412; 4 id., 563,)—judicial, (11 Mass., 227; 11 S. & R., 429, adopted in 2d Peters, 167, 168,)—or special, (20 J. R., 739, 740; 2 Dow. P. Cas., 521, &c.,) unless an appeal is provided for; or other revision, by some appellate or supervisory tribunal, is prescribed by law."

In the case before us, no question is made as to the power of the Board to determine upon the claim in question, and how much, if anything, was due from the State of Michigan to the claimants. Although fraud in the defendants is alleged in the complaint, as a ground for setting aside the decision of the Board, and recovering back the money which the plaintiffs have paid to the defendants in pursuance of such decision, yet it is not found as a fact that any fraud was practised or intended by the defendants.

On the contrary, the learned Judge before whom the action was tried at Special Term, in the opinion accompanying his decision, says: "I am gratified in being able to arrive at my conclusions, without any imputation upon the integrity of the officers of the Phœnix Bank. They acted with fidelity to their principals, and without criminality towards the State. They were acting under an honest but gross delusion as to their rights and the responsibility of the State." (Opinion, p. 31.)

If the rule stated by Mr. Justice STORY be a well settled rule of law, and if it be true that the powers and duties of the Board are in their nature judicial, and that no fraud was practised by the defendants in their proceedings before the Board; then it necessarily follows (it being conceded that the Board had full jurisdiction of the subject matter,) that its decision is conclusive, although erroneous, and that the money paid cannot be recovered back in this action, upon the facts established on the trial of it.

The decisions involving the proposition asserted by Mr. Justice STORY, are uniform in its support.

In *Brittain* v. *Kinnaird et al.*, (1 Brod. & Bing., 432,) it was asserted as a general principle, established by all the ancient and recognized by all the modern decisions, "that a conviction by a magistrate, who has jurisdiction over the subject matter, is, if no defects appear upon the face of it, conclusive evidence of the facts stated in it."

In that case, the defendants had authority, under an act of Parliament, on seizure and search, to condemn and direct to be burnt or sold any boat on the Thames suspected of carrying articles stolen, or unlawfully procured from any vessel. Under this act, the plaintiff's decked and registered vessel of 15 tons burden, had been seized by police officers, and condemned by the defendants, who were sued as trespassers.

Chief Justice DALLAS said, it is urged "that, in order to give the magistrate jurisdiction, the subject matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction, by showing that this was not a boat." * * "The magistrate, it is urged, could not give himself jurisdiction, by finding that to be a fact which did not exist." To these views Chief Justice DALLAS answered: "But he is bound to inquire as to the fact, and when he has inquired, his conviction is conclusive of it." * * * "Much has been said about the danger of magistrates giving themselves jurisdiction, and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it."

Similar in principle to the above, are *Henderson* v. *Brown*, (1 Caines., 92,) *The People* v *Collins*, (19 Wend., 56,) *Willis* v.

Havemeyer, (5 Duer, 447, 459,) and numerous others, too familiar to make it necessary to cite them.

In *The Supervisors of Onondaga* v. *Briggs*, (2 Denio, 26–33,) BRONSON, Ch. J., in delivering the opinion of the Court, and speaking of the effect of the act of an officer appointed to tax costs, says: "It is of the same general nature as are the decisions made by a judge or commissioner in proceedings under the insolvent laws; the act to punish fraudulent debtors; between landlord and tenant; and the many other cases that might be enumerated. They are all judicial determinations which are conclusive upon the parties, until they have been reversed, vacated or set aside in the forms prescribed by law. They cannot be attacked in a collateral action, save where the Legislature has so expressly provided. This is a principle of universal application. It extends alike to the decisions of the highest court, and the humblest officer in the State who has been entrusted with the exercise of judicial powers. However desirable it may seem, in a particular case, to disregard the rule, it cannot be broken down without doing a great wrong to the community." * * *

"A power to hear and determine, necessarily includes and carries with it a power which makes the judgment or determination obligatory, without any reference to the question whether it was wrong." (Id., p. 34.)

If alleged to be erroneous, that question must be investigated and determined in the mode and by the tribunal prescribed by law. If no mode of reviewing the determination is prescribed by law, it is absolutely conclusive upon the parties to the proceeding. It can only be set aside on the ground of fraud of the party, in the proceeding in which such determination was made.

The Board of State Auditors of the State of Michigan, in exercising the powers vested in them, and in performing the duties cast upon them, act under the authority of law: their acts are public, and affect the rights of individuals as well as those of the State Government. The law under which they thus act is a statute of that State, and that Board is a tribunal created by and under its Constitution and laws. The decision of such tribunal, in pursuance of the law by which it is created and which prescribes its powers and duties, upon any matters within its jurisdiction, is as conclusive upon the State as upon the individuals

who are parties to the controversy which it has decided. The State cannot, in such a case, claim any exemption from the operation of the rule which is applicable to natural persons. (*United States* v. *Jones*, 8 Peters, 375–385.)

The State of Michigan, by the statutes which define the powers and duties of her Board of State Auditors; and by her Constitution which provides for the creation of such a tribunal to hear and determine all controversies of a specified character between the State and individuals; and by the proceedings which those statutes prescribe for the determination of such controversies; and by the necessary import of the provisions of such Constitution and statutes, consent and agree to be bound by the decision, and undertake, with every person who may be a party to any such controversy between him and the State, to pay, forthwith, any claim which, upon investigation by such tribunal, it shall determine to be just, and the amount it shall decide to be due. (*United States* v. *Jones*, *supra*, and *Murray's Lessee et al.* v. *Hoboken Land and Improvement Co.*, 18 How. U. S. R., 281–286.)

"Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both." * * "It is competent for the United States" (or a State Government) "to sue any of its debtors in a court of law. It is equally clear that the United States" (or a State Government) "may consent to be sued, and may yield this consent upon such terms as it may think just." (18 How. U. S. R., 283.)

When the State of Michigan, under her Constitution and statutes, created the tribunal called the Board of State Auditors of the State of Michigan, to investigate claims against the State, and declared, by one of these statutes, that any sum, found by such Board to be due to a claimant, should be paid forthwith, she pledged herself to be bound by the decision, and, in so doing, was as competent to submit to an investigation of claims against her, upon such terms, as individuals are to submit a real matter in controversy to a court, without action, in a manner prescribed by law.

When a claim against the State has been submitted in good faith to a tribunal thus created, and in the manner prescribed by the laws creating it, and confessedly within its jurisdiction, and that tribunal has decided it, and the State has, in pursuance of

such decision, paid the sum decided to be due, the money cannot be recovered back, merely because the Court in which a suit may be brought for that purpose is of the opinion that such tribunal was clearly wrong in the conclusion to which it came, or that facts existed which, if proved, would have led to an adverse decision.

The complaint, in speaking of the proceedings on the part of the defendants before said Board, alleges "that said defendants intending, as aforesaid, to cheat and defraud the State of Michigan," made various representations, which it enumerates and which it avers were false and known to the defendants to be so, and concludes with a prayer "that said allowance of said claim by said Board of State Auditors, and the entry thereof by said Board, be declared to be fraudulent and void as against said plaintiffs, and that the same may be annulled and set aside."

Being of the opinion that the decision of the Board of State Auditors is conclusive, until it is found to have been procured by the fraud or by the fraudulent practices of the defendants, I deem it out of place to enter upon the inquiry whether the defendants, upon the evidence contained in this case in relation thereto, ever had any just claim upon the State, or, if it had, whether it forfeited or extinguished such claim by its subsequent transactions with the banks named in the complaint and proceedings in this action.

To whatever conclusion the Judge, at Special Term, might have properly come upon the evidence before him, it is enough to make it necessary to grant a new trial, that he has not found the defendants guilty of any fraud in fact or intent.

Although neither the Attorney-General nor any other person appeared as attorney for the State before said Board, on the auditing of said claim, that fact does not affect the question of the jurisdiction of said Board, nor impair the force of its decision.

It is not found by the Judge that the Board did not notify the Attorney-General. No such fact being found, the legal presumption is, that the Board did its duty, and gave to him the notice required by law.

For these reasons, I think the judgment should be reversed, and a new trial granted, the costs of the former trial and of this appeal to be costs in the cause, and abide the event.

Ordered accordingly.

FELIX W. RENICK v. JOHN ORSER, Sheriff.

1. In an action against the Sheriff, for the escape of a person arrested by him upon an execution against the body of such person, it is no defense that such execution was issued before one against the property of such person had been issued and returned unsatisfied.
2. The issuing of a *ca. sa.* before the return of a *fi. fa.* unsatisfied, is an irregularity merely, and does not make the *ca. sa.* void.
3. Section 140 of the Code, by abolishing "all the forms of pleading" theretofore existing, has not affected the measure of a sheriff's liability for the escape of a person committed on a *ca. sa.*, as declared by 2 R. S., 437, § 66. [Sec. 63.]
4. In such a case, the sheriff is liable for the debt, damages, or sum of money for which such prisoner was committed, and such debt, damages, or sum of money may be recovered of the sheriff, since the Code, where the complaint states all the facts essential, according to the former practice, to a good declaration in debt; and prays judgment for the amount of the judgment on which such prisoner was committed.
5. Whether interest on such judgment be recovered in an action brought to enforce the liability declared by 2 R. S., 437, § 66. [sec. 63,] *Quære.*
6. In an action for the escape of a prisoner committed on a *ca. sa.*, and duly admitted to the jail liberties; where the escape counted on is alleged and proved to have occurred in August, 1855, it is no defense that in January of that year there was a prior escape; if it appears that the prisoner voluntarily returned into custody and continued there until the second escape, and it does not appear that the plaintiff had any notice of the first escape before the return of the prisoner into custody; although the action is brought more than a year after the first escape, and the defendant pleads the statute of limitations.

(Before BOSWORTH, Ch. J., and MONCRIEF, J.)

Heard, February 7; decided, March 12, 1859.

THIS action comes before the Court at General Term, on a verdict taken subject to the opinion of the Court on questions of law arising at the trial, and there ordered to be heard in the first instance at the General Term.

This action was commenced on the 12th of April, 1856, and was tried before Mr. Justice HOFFMAN and a jury, January 29, 1858. It appeared on the trial that on the 15th of September, 1854, the plaintiff recovered in this Court a judgment against Solomon Poly for $512.04, in an action to recover the price of goods sold and delivered by the plaintiff to Poly.

That on or about the 19th day of September, 1854, an execution was issued on said judgment to the defendant, then being Sheriff of the city and county of New York, against the body of said Poly.

On this execution the defendant arrested Poly, and Poly, as the answer in this action alleges, on the 22d of September, 1854, executed to the defendant as such Sheriff a bond, in the form and with the condition prescribed by statute, to entitle Poly to go at large within the jail limits in said city and county.

When said execution was offered in evidence, "the counsel for the defendant objected to the admission of the same in evidence, unless an execution against the property of said Poly on said judgment should first be produced and read in evidence.

"The Court overruled said objection, and admitted the testimony, and thereupon the counsel for defendant then and there excepted to said decision.

"The said execution was thereupon read in evidence.

"The counsel for the plaintiff then offered in evidence an order of arrest in said action of Renick against Poly, together with the original affidavit on which the same was granted.

"But the counsel for the defendant objected to the admission in evidence of the said affidavit, and the Court thereupon sustained said objection, and refused to admit said affidavit in evidence; whereupon the counsel for the plaintiff then and there excepted to said decision.

"It was thereupon admitted by the respective counsel of the plaintiff and defendant, that the said Poly was arrested by the defendant under said order of arrest and execution."

The plaintiff then proved that Poly sailed from the city of New York with his family for California, in August, 1855, and also proved by his relatives residing in the city of New York, that they had not seen Poly or heard of his being in that city since.

When the counsel for the plaintiff rested his case, the counsel for the defendant moved to dismiss the plaintiff's complaint upon the grounds:

1st. That the plaintiff had not shown any right to arrest the said Poly on execution, or that the action was one in which the said Poly might have been arrested.

2d. That plaintiff had not shown any escape.

3d. That the action was barred by the statute of limitations.

4th. That no execution against the property of Poly had been issued or returned, before the issuing of the execution against his person.

The Court overruled the motion upon each and every of the said points so taken, and to the decision of the Court the defendant excepted, and the exception was duly noted.

The defendant's counsel then proved that Poly was in Ohio in January and March, 1855, and that he returned to the city of New York in the spring or summer of that year. There was no evidence that the plaintiff or the defendant knew, or had any reason to suspect that Poly had been to Ohio, until after his return within the jail limits of the city and county of New York. The defendant also gave evidence in relation to the property and pecuniary means of Poly at the time he left for California, and rested.

The plaintiff then proved that an execution against the property of Poly had been issued to the defendant as Sheriff of New York county, on plaintiff's judgment against Poly, and that the issuing of the execution against Poly's body, before the actual return of the execution against his property, was in consequence of information given at the office of the Sheriff by his deputy, to the plaintiff's attorney, that the latter execution had been actually returned unsatisfied.

The evidence tended to show that the deputy was not accurately understood by the plaintiff's attorney, or that his answer to the question whether the *fi. fa.* had been returned, was calculated to be understood in a sense different from that intended by the deputy.

The *fi. fa.* was not in fact returned until three days after the *ca. sa.* was issued to the Sheriff.

When the testimony was closed on both sides, the defendant's counsel moved that the complaint be dismissed on the following grounds:

1. By reason of the escape to Ohio, the cause of action accrued more than one year before the commencement of the suit.

2. The plaintiff did not show that the execution against the person was preceded by an execution against property, and that

no execution against property had been returned before the execution against the person had been issued.

3. The execution against property was returned unsatisfied by the direction of the plaintiff.

4. There was no proof that the case was one in which the defendant could have been legally arrested.

The jury, in answer to certain questions specially submitted, found, 1st. That Solomon Poly, on the 12th of August, 1856, was out of and beyond the jail limits of the city and county of New York.

2d. That the principal of plaintiff's judgment against Poly was $512.04, and that the interest on it to the day of trial was $120.89.

3d. In answer to the question, "What was the value of Solomon Poly's property on the 6th day of August, 1855?" the jury answered that "the property in his possession, to wit, his furniture, which realized $80 cash, is all that is proven."

4th. In answer to the question, "What was the value of Solomon Poly's property on the 12th day of August, 1856?" the jury answered, "Not shown."

The court thereupon directed a general verdict to be entered for the plaintiff, subject to the opinion of the Court at General Term, upon a motion to be made by the plaintiff for judgment founded upon a case and exceptions; the defendant's exceptions to be inserted and to be heard in the first instance at General Term at the same time, with liberty to the Court to adjust the verdict, or to enter judgment for the defendant, or for a dismissal of the complaint.

At the February General Term, 1859, the defendant moved that the verdict be set aside and a new trial ordered, and the plaintiff at the same time moved for judgment on the verdict.

William Stanley, for plaintiff.

David Dudley Field, for defendant.

BY THE COURT—BOSWORTH, Ch. J. On the argument before us, the counsel for the defendant submitted the following points, (and neither argued nor suggested any other,) viz.:

"I. The execution against the person of Poly was void; no execution against his property having been previously issued and returned. (Code, §§ 178, 288, 283; 3 Abbott, 229.)

"II. If Poly had been legally arrested his escape took place as early as March, 1855. This action was not commenced until April, 1856. It should have been brought within the year. (Code, § 94.)

"If it is stated that Poly returned into custody after the escape to Ohio, the answer is, that there is no proof of such return. All the proof is of his being afterwards in the city of New York.

"III. The plaintiff sustained no damage by Poly's escape; he had no property beyond what was exempt from execution. This action is for damages. (17 Wend., 543; 3 Seld., 195, 550.)"

On the argument, the defendant's counsel stated that he should argue the first point only, and did not argue any other, at the same time stating that he did not intend to thereby waive either of the other of said two points, or to concede the plaintiff's right to recover interest on his judgment, if entitled to recover at all, or that in the latter event, he was entitled to recover more than he had actually lost by reason of the escape of Poly.

The points made by the defendant's printed points, will be considered in their order.

By the 7th section of "An act concerning judgments and executions," passed April 2, 1813, (1 R. L., 502,) it was provided that "no execution shall hereafter issue upon any judgment rendered as aforesaid, in any action in which special bail shall have been filed, against the body of any defendant" * * "until an execution against the goods and chattels, lands and tenements of such defendant shall have been issued upon such judgment," &c., and shall have been returned, no property, &c.

2 Revised Statutes, (p. 363, § 4,) contains a provision of the same import, though in not exactly the same words.

Section 288 of the Code is not, like the two statutes last cited, prohibitory in its terms, but merely declares, that if the action be one in which the defendant might have been arrested, as provided in section 179 and section 181, an execution may be issued against the body, after the return of an execution against his property has been returned unsatisfied, in whole or in part.

Under the act of 1813, it was expressly adjudged, that the Sheriff, when sued for the escape of a judgment debtor, who was in custody on a *ca. sa.*, could not set up as a defense, that the debtor had been held to bail in such action, and had actually filed special bail, and that no execution against his property had been issued and returned unsatisfied. (*Hinman* v. *Beers*, *Sheriff*, 13 J. R., 529.) The Court held that, at most, it was an irregularity, and the only remedy was a motion to set the execution aside, that it was not void, but was merely voidable. *Scott* v. *Shaw*, (13 J. R., 378,) is to the same effect. These cases were decided in 1816, more than 40 years ago.

In 1828, in the case of the *Ontario Bank* v. *Hallett*, (8 Cow., 192,) the Court decided that, in such an action, it was no defense to the Sheriff that the *ca. sa.* was issued after a year and a day from the perfecting of the judgment, without the previous issuing of a *sci. fa.*, and cited the two cases in 13 J. R., *supra*, as an authority for the proposition. (See *Ames et al.* v. *Webbers*, *Sheriff*, 8 Wend., 545; *Anonymous*, 2 Hill, 378; *Commercial Bank of Oswego* v. *Ives*, 2 Hill, 354; Graham's Practice, 2d ed., 364, 365; 6 How. Pr. R., 73.)

We cannot hold the execution against the body in this case void, without disregarding a long series of express adjudications. If it is irregular merely, and not absolutely void, the defendant's counsel does not contend that the Sheriff can defend on the ground that an execution against property had not been previously issued and returned unsatisfied. His argument is, that the *ca. sa.* is void, and that the Sheriff, therefore, is not bound to execute it, and that the fact of its being void is a defense to this action.

We consider ourselves required by the decisions to which we have referred to hold, that the *ca. sa.* was irregular merely, and not void, and that the irregularity in issuing it is no defense to this action.

The escape was a negligent and not a voluntary escape. The return of Poly within the jail limits, after he had been in Ohio, would be an answer and a defense to an action brought after such return and while he continued within the limits, for an escape based on his absence from the limits while in Ohio. (*Howland* v. *Squier*, 9 Cow., 91; *Vanhoesen* v. *Holley*, 9 Wend., 209; 2 R. S., 435, § 51, [sec. 48;] id., 437, sec. 64.) There is, therefore, no defense proved arising out of the statute of limitations.

Section 140 of the Code, by abolishing "all the forms of pleading" theretofore existing, has not changed the liability of a sheriff as declared by 2 Revised Statutes, 437, section, 66, [sec. 63.] By the latter section, the sheriff, in case of the escape of a prisoner committed to the jail of his county, in execution in a civil action, is liable to the plaintiff in such execution "for the debt, damages, or sum of money for which such prisoner was committed." That section prescribed the action of debt, as the one in which such liability for that sum was to be enforced.

The Code has abolished a *capias ad respondendum*, and a "declaration," as a process or proceeding by the service of which an action may be commenced. It requires a plaintiff to state in his complaint the facts constituting his cause of action. The plaintiff in the present action has done that, and alleged in his complaint all that was requisite to be stated in an action of debt; and his complaint concludes with demanding "judgment against the defendant for five hundred and twelve dollars and four cents," (the face of the judgment,) "with interest from the 15th of September, 1854," (the date of the judgment,) "and the costs of this action."

This is not an action for the recovery of damages, as such, but is an action to "recover the sum of money for which such prisoner" (Poly) "was committed" in execution to the jail of defendant's county, at the time of the alleged escape.

The Sheriff is liable, at all events, for $512.04, the amount of the judgment.

The only decisions to which we were referred, or which have fallen under our observation, hold that, in an action of debt for the escape of a defendant in custody on a *ca. sa.*, only the face of the judgment, without interest, is recoverable.

Rawson v. *Dole*. (2 J. R., 454.) This case arose prior to the passage of the statute allowing interest upon the amount of the judgment to be collected or demanded upon the execution issued thereon.

Van Slyck v. *Hogeboom*, (6 J. R., 270 and note *d*,) *Thomas* v. *Weed*, (14 *Id.*, 255,) *Hutchinson* v. *Brand*. (6 How. Pr. R., 73.) The point of these cases seems to be, that the action of debt is in the nature of a penalty, and, by resorting to that action, the plaintiff, on the one hand, is not permitted to recover more than the amount of the judgment, and, on the other, is not exposed

to the hazard of having his recovery reduced below that sum, by proof of the pecuniary irresponsibility of the judgment debtor.

If he chooses to sue in case, as he may do, he may recover more than the face of the judgment if his actual damages are shown to exceed it, and will be exposed to the recovery of nominal damages only, if the debtor shall be proved to be utterly insolvent.

We think that the plaintiff should have judgment for $512.04, and for that sum only.

Judgment accordingly.

CHARLES F. LOOSEY, Receiver, *et al.*, Plaintiffs and Appellants, *v.* JOHN ORSER, Sheriff, Defendant and Respondent.

1. A Sheriff, who suffers and permits a person, whom he has arrested upon a process for contempt, to escape and go at large, by which process such person is to stand committed until a fine that has been imposed upon him and specified therein is paid, is liable to the party aggrieved for his damages sustained thereby.
2. In such a case, the true measure of damages is the value of the custody of such person, at the time of his escape.
3. An answer to a complaint in an action for such an escape, which alleges that such person, from the time of his arrest on such process down to the time of putting in such answer, has been utterly insolvent and irresponsible, and has possessed no property of any kind out of which any part of the sum directed to be collected by such process could be made, is, under the Code, sufficient as a pleading.
4. Such allegations, if true, show that only nominal damages can be recovered.
5. Facts constituting a partial, though not a full defense, make an answer, sufficient as a pleading, according to the Code.
6. A complaint, in an action against a Sheriff for the escape from his custody of a person arrested by him upon a process for contempt, which alleges that the Sheriff "suffered and permitted such person to escape and go at large," states a voluntary and not a negligent escape.
7. An answer (to such a complaint) which, in terms, is stated to be "a further separate and distinct defense," and which avers that such person "may have wrongfully and privily, and without the knowledge, permission, or consent of this defendant, escaped," &c., and that, "if he did so escape, he

afterwards" returned into custody, &c., is insufficient as a pleading, as it does not deny, either generally or specifically, the allegation that the Sheriff permitted the prisoner to escape.

8. The statute requires, as essential to the sufficiency of an answer to such a complaint, that it contain averments, whatever may be the words used, amounting to a clear and distinct allegation that the alleged escape "was made without the consent of the defendant."

9. Each defense in an answer which, by its terms, is declared to be "a further separate and distinct defense," must be complete in itself; and cannot be aided by a resort to other parts of the answer to which it contains no reference in terms, or by necessary implication.

(Before Bosworth, Ch. J., and Slosson, Woodruff, Pierrepont and Moncrief, J. J.)

Heard, February 19; decided, March 12, 1859.

This is an appeal by the plaintiffs, from an order at Special Term, made by Mr. Justice Slosson, on the 22d of October, 1858, overruling plaintiffs' demurer to the second and third defenses, stated in the defendant's answer. The action is brought against the Sheriff for the escape of one Stephani from his custody as such Sheriff. Stephani was in custody upon a process for contempt. He had violated an injunction issued in an action, to which he was a party, pending in the Supreme Court, had been duly adjudged guilty of a contempt of Court, and fined on the 24th of November, 1855, $8,937.70, and was ordered to stand committed until that fine was paid, which fine, by the terms of the conviction, was to be paid to the plaintiffs. The complaint states all the proceedings prior to and resulting in such adjudication, the adjudication itself, the process issued to the defendant, as Sheriff, thereupon; the arrest by him of Stephani on such process, on or before the 12th of December, 1855, and then alleges that the Sheriff so having Stephani in his custody, "afterwards, to wit, on the day and year last aforesaid, and on divers days and times between that day and the first day of January, in the year one thousand eight hundred and fifty-six, at the said City and County of New York, without the leave or license, and against the will of the said plaintiffs, suffered and permitted the said Charles L. Stephani to escape and go at large; and the said Charles L. Stephani did then and there escape and go at large wheresoever he would, out of the custody of the said defendant, he, the said defendant, so then being Sheriff as aforesaid, and the

said sum of money so mentioned in the said writ as aforesaid being then and still wholly unpaid and unsatisfied, whereby an action hath accrued to the said plaintiffs to demand and have, and they do demand judgment against the said defendant for the said sum of eight thousand nine hundred and thirty-seven dollars and seventy cents, with interest thereon from the twenty-fourth day of November, one thousand eight hundred and fifty-five, and the costs of this action."

The answer, first, denied each and every allegation of the complaint, except it admitted the receipt by the defendant of the warrant of commitment, on the 12th of December, 1855, the arrest of Stephani thereupon, that the defendant was then Sheriff, and continued to be until the 1st of January, 1856, and some other allegations having no connection with the questions raised by the appeal. The answer then proceeds, and concludes as follows, viz.:

"And as a further and separate and distinct defense, (the second defense,) this defendant alleges, that after the arrest of the said Stephani, the said Stephani may have wrongfully and privily, and without the knowledge, permission or consent of this defendant, escaped from out of the custody of this defendant, to places to this defendant unknown; but this defendant alleges, that if the said Stephani did so escape, he afterwards, and before the commencement of this action against this defendant, voluntarily, and of his own accord, returned back within the walls of the jail of the said city and county, into the custody of this defendant, and that this defendant did then and there closely keep and detain the said Stephani until the first day of January, 1856, on which day this defendant's term of office as such Sheriff, expired, when he assigned and delivered over the said Stephani to James C. Willett, who had been duly elected to the office of Sheriff of the City and County of New York, and who duly qualified and gave the security on that day required by law, in such case made and provided, and duly entered upon his duties as such Sheriff on that day.

"And this defendant, as a further, separate and distinct defense, (the third defense,) or by way of mitigation of damages, upon his information and belief, alleges and insists that the said Stephani was, at the time of his alleged arrest, and down to the

first day of January, 1856, and hath ever since been utterly insolvent and irresponsible, and did not possess at the time the said alleged arrest was made, nor at any time down to the 1st of January, 1856, nor has he since been possessed of any real or personal property of any name or nature, or of any means whatever, out of which the said amount mentioned in said writ, or any part thereof, could have been collected or satisfied; and the defendant alleges that the plaintiffs have not sustained any damage, or any other than nominal damage, by reason of the alleged escape of the said Stephani.

"Wherefore, the defendant demands and insists that the said complaint be dismissed, with costs and disbursements of action."

"The plaintiffs demurred to the second defense stated in the answer of the above named defendant, to the complaint in this action, for insufficiency, on the following grounds:

"1. The allegation in said defense, setting up the voluntary return of the prisoner into custody before suit brought, that he may have wrongfully, privily and without the knowledge, permission or consent of the defendant, escape, is not well pleaded, the complaint being for a voluntary escape only.

"2. The commitment under which the prisoner was held was final process, and his voluntary return into custody after an escape, did not deprive the plaintiffs of their right to sue the Sheriff for an escape.

"3. The commitment was not criminal process within the meaning of the rule, that the Sheriff can retake a prisoner whom he has voluntarily permitted to escape from imprisonment, on final criminal process.

"4. That the said second alleged defense is insufficient in other respects.

"The plaintiffs also demurred to the third defense stated in the answer of the defendant to the complaint in this action for insufficiency, on the following grounds:

"1. This being the action of debt for an escape on final process, the plaintiffs, if entitled to recover at all, are absolutely entitled to recover the amount, to enforce the payment of which the prisoner was committed; and the part of the answer setting up facts in bar or mitigation of damages, is therefore no defense to the action.

"2. That said third defense stated in said answer is in other respects insufficient."

Both demurrers were overruled, and from the order overruling them, the plaintiffs appealed to the General Term.

Jeremiah Larocque, for appellants (the plaintiffs).

I. The statutes regulating the action for an escape, in this case are 2 Revised Statutes, (p. 437, marginal paging, original §§ 61 to 66.)

II. The voluntary return into custody, before suit brought, is therefore no excuse to the Sheriff, because section 64 in express terms allows that defense only where it is coupled with the averment that "such escape was made without the consent of such defendant."

III. The general denial of the allegations of the complaint, contained in a preceding part of the answer, is not a compliance with this requirement of the statute.

1. That part of the answer containing that general traverse is pleaded as a separate defense by itself; and the subsequent defense setting up the voluntary return into custody, contains no reference whatever to the former. (*Xenia Branch Bank* v. *Lee*, 7 Abb., 372; *S. C.*, 2 Bosw., 694.)

2. But if that general traverse were actually incorporated into this defense it would not suffice. The object of the requirement in the statute is to probe the conscience of the defendant by making him expressly affirm the absence of consent on his part to the escape, not to allow him to slur it over, by claiming that it is embraced in a denial in the form of a mere general issue. (*Ford* v. *Babcock*, 2 Sandf., at p. 523, and cases cited.)

IV. It is substantially conceded by the learned Judge, in his opinion at Special Term, that the clause in this defense to the effect that after the arrest of the said Stephani, he "may have wrongfully and privily, and without the knowledge, permission or consent of this defendant, escaped from out of the custody of this defendant, to places to this defendant unknown," is not, as required by the statute, pleading "that such escape was made without the consent of such defendant." This is manifestly so, as alleging that a man may have done one thing is never an averment that he has not done another.

V. The statute having regulated the whole subject, the question whether the commitment is to be regarded as civil or criminal process, or what, before the statute, would have been the different shades of liability, or rights of the Sheriff under the one or the other, is of no importance except in so far as it may afford light to the Court in construing the statute itself.

VI. Before the statute, and treating this as criminal process, and admitting that it was the right and duty of the Sheriff to retake the prisoner, even after a voluntary escape, all this would not have excused the Sheriff from his common law liability to the parties interested in the safe custody of the prisoner, incurred by reason of the previous escape. (Hawkins' Pleas of the Crown, b. 2, ch. 19, § 13; *Ridgeway's Case*, 3 R., 52; 1 Hale's Pleas of the Crown, p. 602; 1 Rolle's Abridg., 810, Escape G., 1, 2; *Minton* v. *Woodworth*, 11 Johns., 474; *Lansing* v. *Easton*, 7 Paige, 364; *Wheeler* v. *Bailey*, 13 Johns., 366; *Pulver* v. *McIntyre*, 13 Johns., 503; *Thompson* v. *Lockwood*, 15 Johns., 256; *Brown* v. *Littlefield*, 1 Wend., 398; *Lansing* v. *Fleet*, 2 Johns. Cas., at pp. 14, 15, opinion of BENSON, J.)

VII. The plaintiffs are entitled to recover in this case the whole amount of the fine, to enforce the payment of which Stephani was committed, and interest, and his inability to pay is no defense either in bar or in mitigation.

1. This is the invariable rule in the form of action where the plaintiff's claim had become liquidated and reduced to a certainty by a judgment, and when the process is in the nature of final process to collect a certain liquidated amount. (*Van Slyck* v. *Hogeboom*, 6 Johns. R., 270; *Thomas* v. *Weed*, 14 id., 255; *Rawson* v. *Dole*, 2 id., 454.)

2. This is so, because the imprisonment of the body in such a case is, while it continues, satisfaction of the debt. The plaintiff, by suing the Sheriff, elects to consider the defendant out of custody.

3. The reason why the 61st section, in reference to the measure of the Sheriff's liability, provides that "he shall be liable to the party aggrieved for his damages sustained thereby," is that the process of contempt from which the defendant escapes, may be either the attachment, corresponding to the mesne process in a civil action, or the final commitment, corresponding to the execu-

tion; and even where it is the latter, the commitment may include both a fine, payable to the party for his damages sustained by the contempt, and a fine payable to the people for the criminal contempt, and the same commitment may include different fines, payable to different aggrieved parties. The language of the statute is therefore to be taken distributively, as applicable to these different cases. It did not intend to alter the rule of damages, as applicable to mesne or final process.

4. The case provided for by the 63d section, on the contrary, is the single one where there is a single sum recovered by judgment, payable to the plaintiff in the suit, or what is equivalent, as hereinafter shown, by attachment for costs, and the imprisonment is in execution on that judgment or attachment; and that section, therefore, uses language applicable only to that one specific case.

5. The policy of the law would be entirely defeated if the Sheriff were allowed to speculate as to the amount of liability that he would probably incur by permitting the party committed to go at large.

6. The very nature of the process supposes that the party committed is a fraudulent debtor, whose means are kept concealed, and from whom payment can only be enforced by actual bodily restraint. If, therefore, the Sheriff were at liberty, after suffering a voluntary escape, to reduce the recovery against him to nominal damages, by calling his accomplice to swear that he had not means to pay the fine, the process of commitment would be but an idle ceremony.

VIII. This construction is still further fortified by comparison of sections 61, 62 and 63.

1. In section 61, where mesne and final process of contempt are included in one section, the form of action is not prescribed, but the plaintiff is left at liberty to bring either case or debt, as the escape may have been from mesne or final process, and the language declaring that the Sheriff shall be liable to the party aggrieved for "his damages sustained thereby," is likewise distributive.

2. In section 62, on the other hand, providing only for the case of mesne process in civil actions, trespass on the case is expressly prescribed as the form of action, and the recovery ex-

pressly limited to the "extent of the damages sustained by him;" while

3. In section 63, providing exclusively for the case of final process in civil actions, debt is expressly prescribed as the form of action, and the "debt, damages or sum of money for which such prisoner was committed" as the amount of the recovery.

IX. The learned Judge, at Special Term, as is evident from the whole tenor of his opinion, lost sight of the controlling consideration in this case; that as the Revised Statutes have now regulated the whole subject of the Sheriff's liability, in an action for an escape, and have made no distinction for that purpose, except such as is to be drawn from the language of the sections themselves, between civil and criminal process, whether the commitment in this case is to be regarded as the one or the other, is of no importance whatever. Thus, a voluntary return in case of a mere negligent escape, is as good a defense to the Sheriff, under the statute, in case of an execution, as in that of process of contempt, and is no better defense in case of a voluntary escape, under the statute, where the process is for contempt, than where it is an execution.

X. The learned Judge also manifestly drew an inference unfavorable to the construction of the statute, contended for on the part of the plaintiffs, from the fact of the attachment for costs being grouped in the same section, and made subject to the same rules as an execution upon a judgment. It is respectfully submitted that the inference should be directly the contrary.

1. The attachment for non-payment of costs is peremptory and final in the first instance, following immediately upon the order of the court for the payment of the costs, as the execution does upon the judgment. (2 R. S., marg. p. 536, § 4.)

2. It is, therefore, the only case where the process of contempt to enforce civil rights and remedies must inevitably be final as distinguished from mesne process.

3. The Legislature, by coupling it with the execution in regulating the action for escape, thus evidenced the intention of assimilating the remedies in that action, in cases of civil actions and of process of contempt, in all respects.

XI. The use of the word "damages," in the 61st and 62d sections, in place of the words "debt, damages, or sum of money,

for which such prisoner was committed," in the 63d section, affords no presumption against the construction contended for.

1. The word "damages" is a word of known legal signification, applicable as well when the measure or rule of damages is a fixed and certain amount, as when the damages are unliquidated and uncertain.

2. It was, therefore, the most appropriate word to use in a distributive sense, where both classes of cases were to be provided for, as in section 61.

3. The Legislature, by the change of phraseology from the words "for his damages sustained thereby," in the 61st section, to the words "to the extent of the damages sustained by him," in the 62d section, gave further evidence that this distinction was constantly and carefully kept in view, and the word "damages" employed in its proper distributive sense. The judgment of the Special Term, overruling the demurrers to the answer, should, therefore, be reversed, and judgment rendered for the plaintiffs, upon those demurrers.

Wm. Curtis Noyes and *A. J. Vanderpoel*, for respondent (the defendant).

I. The commitment of Stephani was upon process for a contempt, and in the nature of, if not actually as a punishment for, a criminal offense. No act, therefore, could be done or suffered by the Sheriff which would deprive him of the right to re-arrest Stephani, and commit him to prison, or keep him in prison, if he voluntarily returned into custody under such process. (*Lansing* v. *Easton*, 7 Paige, 364, 7; *People* v. *Stone*, 10 Paige, 606; *People* v. *Spalding*, id., 286; *S. C.*, 7 Hill, 301; *S. C.*, 4 How. U. S. R., 21; *Clark* v. *Cleveland*, 6 Hill, 344.)

II. Conceding, for the sake of the argument only, that an action for an escape will lie in such a case as this, at the suit of the party to whom the fine imposed for the contempt may be payable, still a retaking on fresh pursuit; or (as in this case) a voluntary return to custody, before suit brought, may be pleaded, and constitutes a good defense. (Bacon Abr., Escape, "H;" 2 R. S., 437, § 62.)

III. The defense of such voluntary return is properly pleaded.

1. The answer denies the permissive escape, as shown by Judge SLOSSON in his opinion.

2. The answer upon that subject, though in the subjunctive, is in accordance with all the ancient precedents. (3 Chitty's Pl., 5 Am. ed, 958, 959; *West* v. *Eyles*, 2 W. Black. R., 1059.)

IV. If this is a case in which the plaintiffs can sustain any action, still they can only recover the actual damages sustained by means of the escape, and therefore the last branch of the defense, that Stephani was utterly insolvent, and that, consequently, nothing could be recovered of him by means of the imprisonment, was properly pleaded in mitigation of damages. (Bacon's Abr., Escape, "F;" Stat., Westm. 2, chap. 11; 2 R. S., 437, §§ 62, 63; Laws 1847, ch. 390, § 2; 2 R. S., 4th ed., 681; Sedg. on Damages, 2d ed., 508; *Ledyard* v. *Jones*, 3 Seld., 550.)

The order overruling the demurrer should be affirmed, with costs.

BY THE COURT—BOSWORTH, Ch. J. Section 8 of the act of the 19th of March, 1787, (Laws of N. Y., Greenl. ed., vol. 1, p. 410,) and section 21 of the act of April 6, 1813, (1 R. L., p. 426,) so far as they relate to a prisoner committed to prison "upon contempt," are, in substance, the same as section 64 [section 61] of 2 Revised Statutes, 437, except that the latter section declares the sheriff, in case he suffers or permits any prisoner so committed "to go or be at large out of his prison," "shall be liable to the party aggrieved for his damages sustained thereby, and shall be deemed guilty of a misdemeanor." The two statutes first cited contain no provision in respect to the extent of the Sheriff's liability for such an escape.

Section 8 of the act first cited, and sections 19 and 21 of the act of 1813, provided for the case of the escape of a prisoner committed "upon *mesne process*, or in execution," as well as "upon contempt."

But, after the passage of the act of April 5, 1798, (Sess. 24, chap. 91,) regulating the liberties of jails, (and see 1 R. L., 427, chap. 69, § 6,) the Sheriff was at liberty to allow the prisoner, committed on *mesne process* or in execution, to go at large within the liberties of the jail, without being liable for an escape, provided such prisoner did not go without such liberties.

In the revision of 1830, the Revisors intended, by section 64 [section 61,] (2 R. S., 437,) to provide for those cases only where a prisoner was required to be kept in close confinement. That section, and the three which immediately succeed it, were regarded as declaratory of the then existing law, and not as introducing any new rule of liability on the part of Sheriffs for the escape from their custody of any prisoner named in either of those sections. (Rev. Rep. and Notes, 3 R. S., p. 747, art. 4: "Of escapes, and the liability of Sheriffs therefor.")

It was also perfectly well settled, that a Sheriff could be sued only in *case* for any escape, prior to the statutes which authorized an action of debt, for the escape, of a party committed upon an execution from a court of record, on a judgment in a civil action.

The statute has not authorized an action of debt for the escape of a prisoner committed "upon contempt," or "upon process for contempt," nor declared that when such a prisoner is required, by the terms of the process on which he is committed, to be kept in close custody until he pays a sum certain, as a fine imposed upon him, the Sheriff shall be liable, if an escape occurs, for such sum, absolutely and at all events. On the contrary, it declares that he shall be liable for such damages as the aggrieved party shall have sustained thereby. (2 R. S., 437, § 64, [sec. 61.])

Where the statute has not provided a different form of remedy, case is the only form of action which can be brought against the Sheriff for the escape of a party committed to his custody. And where the statute has not prescribed a different rule of liability, only the actual damages sustained by reason of the escape can be recovered.

And although the statute authorized, in the case of an escape of a party committed on a *ca. sa.*, the recovery from the Sheriff, in an action of debt, of the "debt or damages" for which the prisoner escaping "was committed," yet that remedy has uniformly been held to be cumulative to the remedies at common law. By resorting to that remedy, the plaintiff can recover the amount of his execution, and only that; whereas, if he brings case, as he may do, he will be entitled, on some states of facts, to recover interest on the amount of his judgment, and, on others, may have his recovery reduced to nominal damages.

That case alone will lie, unless the statute has otherwise provided, and that, in an action on the case, only actual damages are recoverable, is settled by *Rawson* v. *Dole*, (2 J. R., 454,) *Van Slyck* v. *Hogeboom*, (6 id., 270, and cases cited in note *d*,) *Spafford* v. *Goodell*, (3 McLean, 97,) *Lash* v. *Ziglar*, (5 Iredell Law R., 702,) *Patterson* v. *Westervelt*, (17 Wend., 543,) *Fairchild* v. *Case*, (24 id., 381,) and *Smith* v. *Hart*, (1 Brev., 146, and note.) (See Robinson's Pr., vol. 2, p. 581, title 5, chap. 61, §§ 4, 5, and 6.)

Some of these cases also determine that when debt is brought for the escape of a party committed in execution, only the principal of the execution, without interest, is recoverable under a statute fixing the debt or damages for which the prisoner was committed, as the sum to be recovered.

The section of the Revised Statutes applicable to the present case, (2 R. S., 437, § 64, [sec. 61,]) makes the Sheriff "liable to the party aggrieved for his damages sustained thereby," that is, by the escape. It is, therefore, only the actual damages sustained by the aggrieved party that can be recovered. The true measure of damages is the value of the custody of the debtor at the moment of the escape. That value must depend upon the circumstances of each particular case.

If the party in custody, upon process for contempt, is to be held in custody only until he pay a pecuniary fine imposed upon him, and if he is utterly insolvent, the damages must necessarily be nominal. If he is ordered to stand committed until he perform a specified act which he has the power to perform, (2 R. S., 538, § 28,) the value of his custody must depend upon the nature of the act, and the consequences to the aggrieved party of a failure to secure its performance.

Since the act of 5th and 6th Victoria, (c. 98, § 31,) by which the only action against a Sheriff for an escape on final process is an action on the case for such damages as the plaintiff may have sustained by reason of such escape, it has been decided that the measure of damages is the value of the custody of the debtor at the moment of the escape. (*Arden* v. *Goodacre*, 5 Eng. L. & Eq. R., 436.)

By the statutes of Massachusetts, the action of debt for an escape on final process has been abolished. The rule established by the Supreme Court of that State, since that change was made,

is, that "the creditor may have an action on the case against the officer, to recover such damages as he shall have suffered by the escape." (*Chase* v. *Keyes*, 2 Gray, 214.)

The rule applied in these cases is, substantially, the rule of damages prescribed by 2 Revised Statutes, 437, section 64. [Sec. 61.] And we think it quite clear, that although the plaintiff is, *prima facie*, entitled to recover the amount of the fine, yet the statute has not prescribed that sum as a fixed rule of damages; but, on the contrary, the defendant is at liberty to plead and prove, if he can, that at the time of the escape the prisoner was wholly destitute of property.

The following cases are also pertinent to many of the propositions already stated, and are authorities which sustain them: *Stone* v. *Wilson*, (10 Gratt., Va., 529,) *Howard* v. *Crawford*, (15 Geo., 423,) *The State* v. *Halford*, (6 Rich., 58,) *Hodges* v. *State*, (8 Ala., 55,) *Prather* v. *Clarke*, (3 Brev., 393,) *The State* v. *Johnson*, (1 Cart., In., 158,) *Wheeler* v. *Pettes*, (6 Washb., 398.)

The matter stated in the answer as a separate and third defense, makes it sufficient as a pleading under the Code, which requires matters to be pleaded which constitute only a partial defense, as well as those which constitute a full defense. (*McKyring* v. *Bull*, 16 N. Y. R., 297.)

In this view of the rights and liabilities of the parties, it is immaterial whether the escape described in the complaint is to be regarded, on an admission (by reason of demurring,) of the truth of the allegations as stated in it, as a voluntary or as a negligent escape. The Sheriff is at liberty to allege and prove the insolvency of the prisoner in reduction of the damages which might otherwise be recovered against him, whether the escape was voluntary or negligent. It follows that the demurrer to the third separate defense was properly overruled.

The only remaining question relates to the sufficiency of the second separate defense stated in the answer.

The complaint avers that the Sheriff "suffered and permitted the said Charles L. Stephani to escape and go at large." The words of the statute are, that "if any sheriff or keeper of a jail shall permit or suffer any prisoner so committed to such jail to go or be at large out of his prison," &c., "he shall be liable," &c. (2 R. S., 437, § 64, [sec. 61.]) The complaint uses the words of the statute—suffer, permit, and uses them conjunctively.

As a voluntary return, or fresh pursuit and recapture of the prisoner before suit brought, is a full defense in case of a negligent escape, it would seem to be illogical to require a sheriff to state, as essential to a sufficient plea to a declaration charging only a negligent escape, that the "escape was made without the consent of such defendant," (id., § 67, [sec. 64,]) in addition to averring fresh pursuit and recapture, or a voluntary return into custody before suit brought against the Sheriff. "Permit" implies consent given or leave granted.

When it is admitted on the record, or has been found by a jury, that the Sheriff permitted a prisoner in his custody to escape, it must be understood to be an escape by consent. It was so deliberately held in 1802, in *Holmes* v. *Lansing*, (3 J. Cas., 73,) and we have not been referred to any subsequent adjudication which questions its accuracy.

The second defense states that Stephani "may have wrongfully and privily, and without the knowledge, permission or consent of this defendant, escaped," &c., "but this defendant alleges, that if the said Stephani did so escape," he returned into custody, &c.

It does not deny that the Sheriff permitted him to escape, nor allege, as a fact, that he escaped without the Sheriff's consent. It merely says, that if he ever did escape without the Sheriff's consent, he voluntarily returned into custody before suit brought and has been since kept in custody.

The allegation that the Sheriff permitted him to escape is not denied either generally or specifically, (Code, § 149,) or by the insertion of an averment in the answer, which, if true, would be inconsistent, or in conflict with such allegation.

The statute requires an averment, whatever may be its words, which amounts in substance to a clear and distinct allegation that the escape stated in the complaint "was made without the consent of the defendant." The second separate defense contained in the defendant's answer has no such averment, either in form or in substance.

The form of this part of the answer is not justified by the precedents for special pleas, in such actions, to which we were referred and found in Chitty's Pleadings. (7 Am. ed., vol. 3, pp. 958, 959.)

They allege, in absolute terms, that the escape was without the knowledge or consent of the defendant; a voluntary return or

recapture before suit brought; the continuance of the prisoner in custody; and that such escape and that alleged in the declaration, are one and the same escape.

The proper form of a replication to such a plea is found in the same volume, p. 1170.

Section 168 of the Code gives to a plaintiff the same rights upon a trial as if he had put in a sufficient replication in proper form.

We think this defense, as the part of the answer containing it now reads, wholly insufficient.

It cannot be aided by a reference made by counsel on the argument, and not made by the defense itself, to another and separate defense contained in the same answer, and by assuming to incorporate some allegations found in the latter into the former.

By permitting such a practice, any one and each of several defenses, all of which, as being insufficient, are separately bad and demurrable, would be severally good if the same answer, in a distinct and independent part of it, denied some allegation of the complaint, without proving which the plaintiff could not recover.

Each defense in an answer, which, by the very words of such defense, is declared to be "a further, separate and distinct defense," must be complete in itself, and must contain all that is necessary to answer the whole cause of action, or that part of it which it professes to answer. (*The Xenia Branch Bank* v. *Lee*, 7 Abb. Pr. R., 373; *S. C.*, 2 Bosw., 694.)

It cannot be made good by a resort to other distinct parts of the answer to which such defense contains no reference, either in terms or by necessary and just construction.

So much of the order appealed from as overrules the demurrer to the second defense is erroneous and should be reversed, and judgment given for the plaintiff thereon, but with liberty to the defendant to amend so much of the answer as contains such defense, and the order should, in other respects, be affirmed, but with liberty to the plaintiff to withdraw his demurrer to the third defense.

Neither party is to have costs of this appeal, and either party availing himself of the liberty hereby granted, will do so upon the condition of waiving the costs of the demurrer, and of the proceedings had upon it at Special Term.

Ordered accordingly.

WOODRUFF & BEACH IRON WORKS, Plaintiffs and Respondents, *v.* HENRY A. CHITTENDEN, Appellant.

SAME PLAINTIFFS *v.* SIMEON B. CHITTENDEN, Appellant.

SAME PLAINTIFFS *v.* WM. H. POMEROY, Appellant.

SAME PLAINTIFFS *v.* ISAAC N. PHELPS and JOHN J. PHELPS, Appellants.

SAME PLAINTIFFS *v.* THEODOSIUS STRANG, Appellant.

1. In an action against a stockholder of a corporation, created under the "act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," (passed February 17, 1848, ch. 40,) to recover of such stockholder to the amount of the stock held by him; on the ground that the plaintiff owns a judgment against such corporation on which an execution has been issued and returned unsatisfied; it is not of itself a defense, that such judgment, though recovered upon a debt contracted with a person not a stockholder, was recovered by a person who was a stockholder, and was subsequently assigned to the plaintiff.
2. The stockholders of corporations created under that statute, are, under section 10, severally, individually, liable to the creditors of the Company, only to an amount equal to the amount of the stock held by them respectively, until the acts required by that section have been performed.

   Their liabilities are fundamentally different from those of the Rossie Galena Company, (as expounded in 1 Comst., 47.)
3. The recovery from a stockholder, in a corporation created by the act of February 17, 1848, of an amount equal to the amount of the stock which he holds, by a creditor of the Company, would be a defense to a suit brought against him by any other creditor of such Company.
4. If a creditor suing a stockholder also holds stock less in amount than that held by the person so sued, the defendant is not on any principle entitled to any greater relief than an abatement from the liability declared by statute, of a sum equal to the amount of the stock held by such plaintiff.
5. But such a deduction, thus made, unless made to one who was at the time a creditor of the company, would not exempt such plaintiff from a recovery against him in a suit subsequently brought by a creditor of the Company.
6. The mere fact, therefore, that the plaintiff, in a suit against the Company, in which a judgment was recovered against it, was a stockholder, is not available as a defense, either partial or total; in an action brought by the

assignee of such judgment against a stockholder, especially when it is not alleged in the answer that the plaintiffs' assignor was a stockholder; nor shown at the trial how much stock he held.

(Before BOSWORTH, Ch. J., and WOODRUFF, J.)

Heard, November 11, 1858; decided, March 26, 1859.)

THIS is an appeal by the defendant, Henry A. Chittenden, from a judgment, entered on a verdict rendered against him upon a trial had before Mr. Justice PIERREPONT and a jury, on the 18th of February, 1858, in an action in which the Woodruff & Beach Iron Works are plaintiffs.

The action was commenced May 20th, 1856, by the plaintiffs, a corporation created under the laws of Connecticut, against the defendant, as a stockholder of The Hudson River Stone Dressing Company, a manufacturing Company organized under the general manufacturing law of The State of New York, passed February 17, 1848.

The plaintiffs' claim was upon a judgment recovered in the Superior Court of the city of New York, by Samuel Woodruff and Henry B. Beach against The Hudson River Stone Dressing Company, June 12th, 1855, for $23,366.61, and assigned to the plaintiffs.

The complaint avers that on the 31st of March, 1853, at the city of New York, George Bliss, Charles Abernethy and Charles T. Shelton duly signed and acknowledged a certificate of incorporation of The Hudson River Stone Dressing Company, as required by law, and sets out the certificate, which states, among other things, that the capital stock of the Company is to be $200,000, divided into 200 shares; and that the trustees who shall manage its concerns for the first year are George Bliss, Charles Abernethy and Charles T. Shelton. That in April, 1853, the last said Company was duly organized, and prosecuted the business, for which it was incorporated, until after the debt (hereinafter mentioned) was contracted.

That the whole of the capital, $200,000, was never paid in, nor was any certificate of the paying in thereof ever made or filed as required by section 11 of the act of February 17th, 1848.

That the plaintiffs, in November and December, 1853, and January and February, 1854, sold and delivered to The Hudson River Stone Dressing Company machinery for its business, of the

price and value of over $22,000, in payment for which the Company, by Charles Abernethy, its Treasurer, duly authorized, made and delivered to plaintiffs nine promissory notes; two for $2,000 each, payable to the order of Woodruff & Beach, and all the others to the order of Woodruff & Beach Iron Works.

That none of the nine notes were paid at maturity, and that on the 14th of September, 1854, all the notes and the claim of the Woodruff & Beach Iron Works thereon were assigned and transferred to Woodruff & Beach.

That Woodruff & Beach brought suit against The Hudson River Stone Dressing Company, on this claim, in the Superior Court of New York, April 11, 1855, and recovered judgment June 12th, 1855, for the amount and interest, $23,366.61, and issued execution, which was returned wholly unsatisfied.

That this judgment was assigned by Woodruff & Beach to plaintiffs, February 22, 1856, and all the claims on which it was recovered.

The complaint then alleges that defendant was a stockholder in the Company from the time of the making of the notes till the return of the execution, to the extent of 33 shares, and demands judgment for $3,330.

The answer denies each allegation of the complaint, and sets up as matter of defense, that the demands embraced in the judgment against The Hudson River Stone Dressing Company, set forth in the complaint, had been paid or secured to be paid by the trustees of the Company, for whose benefit this action is in fact prosecuted. It does not allege that Woodruff & Beach, the assignors of the plaintiff, were at any time stockholders in The Hudson River Stone Dressing Company.

It appeared on the trial that the plaintiffs' corporation was formed October 29, 1853, and was composed of no other parties as stockholders or parties interested, than Samuel Woodruff and Henry B. Beach, and one Charles L. Root, previously the bookkeeper of Woodruff & Beach.

That the capital stock of this corporation was $225,000, being the works of Woodruff & Beach, put in at a valuation of $225,000. That the firm of Woodruff & Beach has never been dissolved, but it has done no business in the way of manufacturing since the plaintiffs were incorporated.

At the trial the plaintiffs proved the notes, judgment and execution, and the several assignments and transfers above stated; and also that the defendant was a holder of eight shares of the stock of the Hudson River Stone Dressing Company; and also that Woodruff & Beach had been stockholders in it from the time it was organized; but there was no evidence tending to show how much stock they, at any time, either jointly or severally held.

It also appeared that Woodruff & Beach, before suing the Hudson River Stone Dressing Company, (as before stated,) brought suits against the Trustees of that Company. After the Trustees were sued, an agreement was made between them and Woodruff & Beach, that the suits against the Trustees should not be further prosecuted, until suits had been brought against the stockholders to recover the same demand, and the result had been ascertained. That Abernethy gave to Woodruff & Beach, under this agreement, his note for $12,500, and Bliss gave his note for $10,000, which notes had been paid. The witness (Samuel Woodruff) by whom the making of this arrangement was proved, testified, that "this arrangement with Abernethy and Bliss was made by Woodruff & Beach, and the notes were received by them; these notes were advanced by Abernethy and Bliss, not as payment at all, but as collateral security; we never received a dollar on account of the notes on which judgment has been recovered, * * we do not pay back unless we recover; * * whatever we first recover, goes to Bliss and Abernethy; we still have a claim against Abernethy and Bliss" for $14,000, "if we don't get it in one way, we mean to get it another." He also testified, that the suits brought against the Trustees were still pending, and that the agreement made with them was in writing, and present in Court.

It was not read or offered in evidence, notwithstanding the plaintiff objected and excepted to the admission of the parol evidence given in respect to the terms of such agreement.

When the plaintiff rested, the defendant moved to dismiss the complaint, upon the grounds:

1. That there was no proof that Abernethy had authority to execute the notes sued on.

2. That the action is not properly brought; that all stock holders should have impleaded in one suit.

3. That the defendant, being a holder of full paid stock, has complied on his part with the requirement of the statute, and is not liable. And that, at all events, the plaintiffs must first exhaust all their remedies against the delinquent subscribers.

4. That Woodruff & Beach, being stockholders of the Hudson River Stone Dressing Company at the time the judgment was obtained by them, could not have brought their action against a co-stockholder in this form, and that these plaintiffs, as assignees, took no better or greater rights by their assignment.

The motion was denied, and the defendant excepted.

When the testimony was closed, the defendant renewed his motion to dismiss the complaint, on the same grounds. It was denied, and he excepted.

The counsel for the defendant further insisted that it appeared by the evidence that the claim on which the action was brought had been paid to the plaintiffs by Abernethy and Bliss, two of the trustees and stockholders, and that said Abernethy and Bliss are the real parties in interest in this action.

But his Honor the Judge decided that there was not sufficient evidence to go to the jury on that point. To which decision the counsel for the defendant then and there excepted.

And the Judge instructed the jury, as matter of law, that they must find a verdict for the plaintiffs for the amount claimed, with interest.

To which decision and instruction the counsel for the defendants then and there excepted.

The jury, under the instruction of the Court, returned a verdict for the plaintiffs, for the sum of eight hundred and ninety-eight dollars.

Judgment having been entered on the verdict, the defendant appealed from it to the General Term. Appeals by the defendants, in the other suits brought by the same plaintiffs, viz., one against Simeon B. Chittenden; one against William H. Pomeroy; one against Isaac N. and John J. Phelps, and one against Theodosius Strang, and presenting substantially the same pleadings, evidence, and exceptions, were argued at the same time, by the same counsel, and on the same points.

William Allen Butler, for appellant (the defendant).

I. The plaintiffs have no right to maintain this action, and the complaint should have been dismissed at the trial, as prayed, inasmuch as they derive their cause of action by assignment from Woodruff & Beach, who were stockholders in the Hudson River Stone Dressing Company, at the time the debt averred in the complaint was contracted, and at all times thereafter.

1. Woodruff & Beach, being stockholders of the Hudson River Stone Dressing Company could not themselves have brought an action against any other stockholder for the recovery of the debt in question. (*Bailey* v. *Bancker*, 3 Hill, 188.)

2. The reason of this inability is, that, until the capital stock was fully paid in, all the stockholders were answerable for the debts of the Company, and one stockholder could not maintain an action against the others for a debt due from the whole. The stockholders were not liable as sureties for the Company, but as principals and copartners. (General Manufacturing Law, 1 R. S., 4th ed., 1216, § 28; *Bailey* v. *Bancker*, 3 Hill, 188, opinion of BRONSON, J., and cases cited there; *Harger* v. *McCullough*, 2 Denio, 119, 123; *Corning* v. *McCullough*, 1 Comst., 47.)

3. The stockholders being thus liable, Woodruff & Beach could not, by assignment of the judgment recovered by them against the Company, confer any greater rights than they themselves had as judgment creditors. No transaction between them and third parties could give a right of action on the judgment which they did not themselves possess. (*Bailey* v. *Bancker*, 3 Hill, 188.)

4. The difficulty is not removed by the assumption that the plaintiffs, the Woodruff & Beach Iron Works, and not Woodruff & Beach, were the original creditors.

(1.) Conceding that the Iron Works had a cause of action against the defendant and other stockholders before their assignment of the notes to Woodruff & Beach, it was extinguished by that assignment, and could not be revived by any subsequent assignment from Woodruff & Beach to them.

(*a*.) The assignment by the Iron Works was absolute "to them, the said Woodruff & Beach, and their personal representatives forever." Though a formal instrument of transfer, it did not even contain power to sue and collect in the name of the assignors.

(*b.*) Up to the time of this assignment, Woodruff & Beach were liable as stockholders to the plaintiffs. By virtue of the assignment, the right of the creditor and the liability of the debtor met in the same persons, and the right of action was discharged. (*Blanchard* v. *Ely*, and cases there cited, 21 Wend., 343; *Thomas* v. *Thompson*, 2 Johns., 471, 474.)

(*c.*) The fact that Woodruff & Beach were liable only to the extent of their stock, does not alter the case. The assignment to Woodruff & Beach, although it transferred the entire cause of action on the notes as against the Hudson River Stone Dressing Company, yet, as between them and their co-stockholders, gave them only a right to contribution; and no greater right could afterwards be conveyed by them to the plaintiffs.

(2.) The Woodruff & Beach Iron Works had no cause of action against the defendant when they assigned to Woodruff & Beach. No judgment had been recovered against the Company, and when judgment was subsequently recovered by Woodruff & Beach, and the right to sue the stockholders was thereby perfected, it was only a right to sue for a contribution. No other right passed by the assignment to plaintiffs.

5. Woodruff & Beach, and the Woodruff & Beach Iron Works, were, in fact, the same parties. The evidence shows that they used their firm name and their corporate name to suit their convenience. The assignment of the notes to the firm was evidently because the firm were the real parties interested in the transaction, and the assignment of the judgment by the firm to the corporation was a mere contrivance to evade the difficulty which stood in the way of a suit by the firm against their co-stockholders.

II. There was sufficient evidence to go to the jury upon the questions whether the plaintiffs, or Abernethy and Bliss, the trustees of the Company, were the real parties in this action, and whether or not there had been a settlement, through the trustees of the plaintiffs' claim. The Judge erred in directing the jury to find for the plaintiffs. The judgment should be reversed, and a new trial ordered.

William M. Evarts, for respondents (the plaintiffs).

I. The ruling of the Judge at the trial that there was no evidence to go to the jury, in support of the defense of payment

of the plaintiffs' claim by the trustees of the Stone Dressing Company and of the prosecution of this action for their benefit, was correct.

1. The Manufacturing Corporations Act makes the trustees liable for the debts of the Company, to its creditors, in a variety of cases. But, in all these cases, the trustees are but sureties for the Company, the primary debtor; and, if charged, will have recourse against the Company for their indemnity.

So the creditor has, by the statute, the direct liability of the stockholders upon the indebtedness of the Company, while the capital remains unpaid. This liability of the stockholders is not as sureties, but as partners; the immunity of mere corporate liability not being granted to the stockholders while the capital remains incomplete.

When, therefore, the trustees are chargeable as sureties, under the statute, to a creditor, who has the double recourse against the corporation and the stockholders, on payment of such a debt, the trustees would be subrogated to the same double recourse.

The provision of security to the creditor by a surety, in whatever form, cannot defeat the creditor's right against the principal debtor.

Nothing beyond this was intimated in any evidence in the case, much less proved. (See the Act, Laws 1848, p. 54, §§ 10, 12, 13, 23; *Bailey* v. *Bancker*, 3 Hill, 188; *Corning* v. *McCullough*, 1 Comst., 47.)

2. The evidence given was illegal, being parol evidence of a contract which was in writing, and accessible as evidence.

The refusal of the Judge to submit this evidence to the jury was correct, in this point of view.

II. The only ground of nonsuit, requiring any consideration, is the fourth proposition of the defendant's counsel on that motion.

1. The circumstance that the plaintiffs—being the original creditor of the corporation, and having the liability of the various defendants (according to the statute) upon its debt—assigned the claim against the corporation to an assignee, who recovered judgment against the corporation, and then reassigned the debt, judgment and all rights pertaining thereto to the plaintiffs, is wholly immaterial.

The objections to one stockholder suing another upon a debt of the corporation, and the rule which limits his remedy to an action for contribution, proceed upon the ground that the plaintiff, in such a suit, is under the same measure of liability as the defendant. This reasoning has no application to the present action.

2. The judgment recovered, and remedy thereon exhausted, against the corporation, make the condition precedent of the statute to the prosecution of an action against the stockholder. The statute in no manner requires that the remedy against the stockholder must be prosecuted by the plaintiff in the judgment against the corporation.

The judgment and the remedies which adhere to it are assignable like any other rights of action. (Incorporations Act, §§ 10, 24; *Bailey* v. *Bancker*, *ut supra*.)

III. The defendant's exception to the exclusion of evidence is untenable, the evidence offered being plainly irrelevant and immaterial.

IV. The additional ground of nonsuit insisted upon in the action against Simeon B. Chittenden, and in that against William H. Pomeroy, is unsupported by the facts in either of those actions. The relation of stockholder was abundantly proved. (Incorporations Act, § 25.) The judgment for plaintiff in each case should be affirmed with costs.

By the Court—Bosworth, Ch. J. It appears clearly, from evidence which the Judge at the trial held to be competent, that the amount which the plaintiffs may recover in this action, is to be paid by them to Bliss and Abernethy.

Or, to state the fact with more precise accuracy, Abernethy gave his note to the plaintiffs for $12,500, and Bliss for $10,000, which notes have been paid. These notes were given and paid upon an agreement that the "trustees" of the Hudson River Stone Dressing Company should not be further proceeded against in the suits brought against them by these plaintiffs, until their suits against the stockholders of said Company were decided, and so much in amount of the sums which Abernethy and Bliss had so paid, should be refunded, as the plaintiffs should recover in such actions against the stockholders.

These facts make Abernethy and Bliss interested in the event of this action, but not the actual parties in interest, as they have no right to the money which may be collected of such stockholders, have no right to control the actions against them, and would not be liable to the stockholders for their costs of such actions, if they should succeed in their defense.

Such facts are not a bar to the present action. The notes, advanced by Abernethy and Bliss, were not advanced or taken as a satisfaction of the suits against them as trustees, (these suits are still pending,) nor as a payment of the claim which is the basis of this action, but as collateral security.

The liabilities of the stockholders of the Hudson River Stone Dressing Company, are very different from those of the Rossie Galena Company. The latter are severally and jointly and personally liable for all debts and demands contracted by the Company. (1 Comst., 47.) The former are severally liable to the creditors of the Company, to an amount equal to the amount of the stock they respectively hold, until the event happens, which, by section 10 of the act of 1848, chapter 40, terminates such liability. (Laws of 1848, p. 56.)

If one stockholder of the Rossie Galena Company could sue another to recover a debt owing by the Company, and collect it, the latter would, it is contended, by such recovery and payment, become a creditor of the Company for the amount of such debt, and as such creditor might sue the plaintiff as such stockholder, and recover it back, which would be absurd. In other words, such a debt is as absolutely the debt of each stockholder as of either, and for its whole amount.

Under the act of 1848, chapter 40, H. A. Chittenden is liable to pay $800 of the plaintiff's demand, and no more.

Assuming that Woodruff & Beach owned stock to the same amount, the defendant, on paying that sum in satisfaction of the recovery against him, might possibly have as much right as a creditor of the Company by reason of such recovery and payment, to recover the same sum of them, as one stockholder of the Rossie Galena Company, by reason of a recovery against and payment by himself, would to recover a like sum of any other stockholder of such Company; still we do not concede that this proposition is tenable.

But if Beach & Woodruff owned stock to a less amount than \$800, the defendant could, at most, recover only a sum equal to the amount of the stock which they held. And if it should be made to appear that Woodruff & Beach had been compelled to pay to other creditors of the Company, in satisfaction of just demands of such creditors against the Company, a sum equal to the amount of their stock, that fact would be a defense to any such action.

The case of stockholders of the Rossie Galena Company is fundamentally different. They are jointly and severally and absolutely liable to creditors of the Company for all the debts of the Company, and are liable as, and on the ground that, *interse*, they are partners. That liability cannot be extinguished, except by actual payment or satisfaction of such debts.

In the present case, each stockholder is liable, as such, to only the amount of his stock. When he has been compelled to pay that sum to any creditor, his liability as mere stockholder is at an end. He cannot recover any portion of such sum from any other stockholder who, before suit brought against him, has been compelled to pay to creditors the amount of his own stock.

The mere fact, therefore, that one stockholder is suing another to recover, in whole or in part, a debt due from the Company, is not, *per se*, either at law or in equity, a bar to the action.

In the present case, it was proved that Woodruff & Beach were stockholders when the debt in question was contracted, and continued such down to the trial of this action. But how much stock they held was not attempted to be shown; nor is it alleged in the defendant's answer that they were stockholders.

It must, perhaps, be presumed that they severally owned at least one share. I know of no principle on which it can be said that the law presumes they owned more.

The mere fact that they were stockholders, without reference to the amount they held, was relied on as being of itself a sufficient ground for a nonsuit. It was not attempted to be used as the ground of a partial defense, but was relied upon as a flat bar.

Hence, when the plaintiffs rested, the defendant moved for a nonsuit on that ground. When the testimony was closed, a dismissal of the complaint was asked on the same ground.

The defendant's position on the present appeal, (point I, sub. 2,) is, that "the stockholders were not liable as sureties for the Company, but as principals and copartners."

They are not liable as copartners; neither are they liable as principals to any particular creditor in any such sense, that a compulsory payment to one to the amount of their stock, will not be a perfect defense to a suit subsequently brought by every other.

If, therefore, this suit had been brought by Woodruff & Beach the fact that they were, from the outset, stockholders, would not of itself be a bar to the action. Whether, if it had been shown that they owned stock to an amount equal to, or greater than that held by the defendant, such fact would be a bar, is a question that does not arise in this case.

Simonson v. *Spencer et al.*, (15 Wend., 548,) more closely resembles this case, than any one arising upon the Rossie Galena Company's act.

By the act incorporating The Harlem Canal Company, the stockholders, were jointly and severally liable for the debts of the Company, to the nominal amount of the stock held by them. (Session Laws of 1826, pp. 369 and 371, § 9; 14 Wend., 20.) In *Simonson* v. *Spencer*, *supra*, (15 id., 549,) the Court said, "these parties do not stand in the relation of partners to each other; and the fact of their being all stockholders cannot present any valid objection to this suit." * * "The statute creating the Harlem Canal Company does not imply that the equities between the parties are to be considered, and the language is, 'and any person having any demand against the said Company may sue any stockholder singly, or any two or more stockholders jointly, and recover in any Court having cognizance thereof.' There is nothing here implying a liability in the other stockholders to contribution; there is no difficulty as to proper parties." The head note to *Bailey & Storm* v. *Bancker*, (3 Hill, 188,) states that "*certain dicta*" in the case of *Simonson* v. *Spencer*, were overruled.

In *Bailey* v. *Bancker*, the Court assumed, that Chief Justice SAVAGE, was in error as to the facts of the case of *Simonson* v. *Spencer*, when he, substantially, asserted that all the parties were stockholders. No notice is taken by Judge BRONSON of the fact, that the two statutes are entirely different. It is in the recollection of one of us, that *Simonson* v. *Spencer* was not cited

on the argument of *Bailey* v. *Bancker*, but a reference to that case was handed to the Court after the argument was concluded. *Simonson* v. *Spencer* was not discussed by counsel, nor was the difference between that act and the Rossie Galena Company's act commented upon.

We think, therefore, that when Chief Justice SAVAGE, in *Simonson* v. *Spencer*, (15 Wend., 549,) states: "These parties do not stand in the relation of partners to each other; and the fact of their being all stockholders cannot present any valid objection to this suit," we may regard him as asserting as a fact in the case, that all the parties to that action were stockholders. And when the radical difference between the two acts is considered, we may regard whatever disapprobation was expressed of that case in *Bailey & Storm* v. *Bancker*, as *obiter dicta*.

But the present action is not brought by a stockholder. The present plaintiffs are not liable as stockholders to any creditor of the Hudson River Stone Dressing Company.

The only defense, based on the fact that their assignors of the cause of action sued on were stockholders, is, that such assignors could not maintain an action like the present because they were stockholders, and therefore their assignees, the present plaintiffs, cannot. But we have seen that such fact is not of itself, and alone, a bar to such an action by the plaintiffs' assignors.

That was the only point made, based on this fact, either on the motion to nonsuit, or to dismiss the complaint.

In any view of the case, the most that the defendants could have claimed, had this suit been brought by Woodruff & Beach, was, that the recovery should be limited to the excess of the amount of the defendant's stock over the amount of that held by Woodruff & Beach. But no such position was taken at the trial, nor are facts stated in the answer to which such a rule, even if sound, could be applied. The position was that Woodruff & Beach, while they owned the cause of action in question, could not have maintained a suit against the defendant, and therefore, as it is argued, their assignees cannot.

We have already expressed the conclusion that this position is untenable.

It follows, that a nonsuit was properly denied, as was also the motion to dismiss the complaint.

To the instruction, that the plaintiffs were entitled to recover of the defendant to the amount claimed, (viz., the amount of the stock held by the defendant,) with interest, the defendant also excepted. The jury found a verdict for $898. The defendant held but eight shares of stock, instead of thirty-three shares as stated in the complaint. The $98 was the interest on $800 from the time of suit brought to the time of the trial. The parties agreed upon the amount of the interest.

The instruction to find a verdict for this sum was erroneous, if the recovery should have been reduced on the presumption, that Woodruff & Beach held severally, even one share of the stock, while the cause of action belonged to them.

We think no such deduction should have been made in this action even on that ground, and on that assumption of fact.

At the time of the trial the defendant had no demand against or debt owing to him by the Company. There was, therefore, no liability of Woodruff & Beach as stockholders for any such debt to be set off.

He was not a creditor of the Company, either at law or in equity, by reason of the cause of action in question, and could not become one, except by paying, in whole or in part, the debt in question.

A deduction from the recovery that has been had, of a sum equal to the amount of the stock held by Woodruff & Beach, would not exempt Woodruff & Beach from an action by an actual creditor of the Company to recover of them the amount so deducted.

And we do not accede to the proposition, that under the statute in question, a stockholder who has been compelled, as such, to pay debts owing by the Company to the amount of his stock, can maintain an action at law by reason thereof, against other stockholders, to reclaim the whole or any part of the money so paid.

Whether those who have been compelled to pay can, in equity, coerce a contribution from those who have not been so compelled, in an action to which all the stockholders are parties, is a question that does not arise on the present appeal.

We think none of the defendant's exceptions are well taken. Evidence was admitted against the plaintiffs' objection, which may have been incompetent.

But the defendant had the benefit of it, and the plaintiffs are not the appellants.

The judgment in this action, and in that of the same plaintiffs in the four other suits against other defendants, argued at the same time, must be affirmed with costs.

Judgment accordingly.

The City Bank of New Haven *v.* Simon Perkins.

1. Where the Directors of a Bank allow its Cashier for several years in succession, without interference or inquiry by them, to transact the business of the Bank in such manner as in his judgment may be proper and for its interest, they thereby, in effect, authorize him to make all and any contracts which he deems expedient in relation to its business which the Directors might lawfully make, and such contracts will conclude the Bank as between it and a party who has dealt with it through such Cashier, and on the faith of his having authority to make such contracts, has loaned money to such Bank; provided the charter of such Bank does not prohibit it from making such contracts through its Cashier.
2. When such a Cashier applies to another Bank for a loan of its circulating bills, upon the security of certain assets of the borrowing Bank, and on such application a loan is agreed to be made upon security stipulated to be given, and in pursuance of such agreement the loan is made, and the bills lent are forwarded from time to time to the borrowing Bank directed to its Cashier and are there received, and the borrowing Bank fails to perform the agreement made by its Cashier; and thereupon the stipulated security is transferred to the lending Bank as originally agreed, the latter may enforce the same to collect the sum due it, and if it consists of bills discounted by the borrowing Bank, the acceptors or indorsers of such bills cannot set up as a defense to an action against them as such acceptors and indorsers, that the lending Bank by force of such transaction acquired no title, but that the bills sued on, notwithstanding such transaction, continue to be the property of the borrowing Bank.
3. Nor will it impair the title of the lending Bank to such securities, that the Cashier of the borrowing Bank gave a note for the sum so borrowed signed by himself individually, and payable to his order as Cashier, if in fact the application was for a loan to his Bank and on its credit, and the loan was in good faith so made.
4. The mere fact, that some bills are forwarded by the lending to the borrowing Bank, under the contract to loan, the circulation of which as money is made illegal by a statute of the State in which the borrowing Bank is

located, (but not by its charter,) and of which statute the borrowing Bank had no knowledge, will not affect the validity of the contract to loan, nor the title of the lending Bank to the securities transferred to it by virtue of such contract.

5. The fact that the money so loaned and sent to the borrowing Bank, was used by the Cashier of the latter for his individual purposes, and not in the business of his Bank, will not affect the validity of the contract to loan, nor the title of the lending Bank to the securities so transferred to it, so as to prevent its collecting the same and retaining from their proceeds sufficient to satisfy the sum justly due to it.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)
Heard, February 15th; decided, March 26th, 1859.

THIS action comes before the Court on questions of law arising at the trial, and there ordered to be heard, in the first instance, at the General Term, the entry of judgment in the meantime to be suspended. It was tried on the 12th of January, 1858, before Mr. Justice WOODRUFF and a jury, when a verdict was ordered in favor of the plaintiffs for $36,541.95.

The defendant is sued, in this action, as the drawer of two several bills of exchange, for the sum of $10,000 each, one dated the 18th and the other the 28th of August, 1854, each payable three months from its date, at the American Exchange Bank, New York; and as the acceptor of two other bills of exchange, for the sum of $5,000 each, one bearing date September 5th, the other September 23d, and each payable three months from its date, at the same Bank. The plaintiffs sue as indorsees of these four bills.

The defenses set up in the answer are, that the plaintiffs are not the lawful owners or holders of either of the bills; that they obtained possession of the bills unlawfully, and have no title thereto.

The answer also states, as a separate, and as the fourth defense, that, on the 23d day of November, 1854, these bills were the property of the Bank of Akron, Ohio; that such Bank committed an act of insolvency on that day, and thereupon, by force of its charter, these bills became the property of the State Bank of Ohio; that, on the 5th of December, 1854, the State Bank of Ohio commenced a suit in Ohio against the parties to this action and others, to collect the said bills; and that such suit was commenced according to the laws of Ohio before this action was

commenced, and the same is still pending, and the pendency of such suit is set up in bar, or in abatement, of the present action.

The answer also states, as a separate, and as the fifth defense, that these bills belonged to the said Bank of Akron, and were lodged by it in said American Exchange Bank for collection, and the proceeds thereof were to be credited to the Bank of Akron, which, or the State Bank of Ohio, as its representative, is now the lawful owner thereof; that while they were so in said American Exchange Bank, the plaintiffs improperly got possession of them, and are now attempting to collect them and apply the proceeds to pay a pretended debt due to the plaintiffs from one J. W. McMillen, the consideration of which grew out of certain Bank notes of the plaintiffs which said McMillen agreed to circulate for the plaintiffs in the State of Ohio, illegally and contrary to the statutes of the State of Ohio; and that the claims, or pretended claims, of the plaintiffs against McMillen are illegal and void, and are the claims for which the plaintiffs now seek to hold the said bills of exchange or drafts as security. The answer concludes by denying that the defendant is indebted to the plaintiffs on account of said bills; and prays a dismissal of the complaint, with costs.

On the trial, the bills sued on were produced, and after the indorsement of them by the American Exchange Bank, and a delivery of them by that Bank to the plaintiffs, had been proved, they were read in evidence. The drawing, accepting and indorsement of the bills, (except the indorsements so as aforesaid proved,) were admitted by the pleadings.

Ezra C. Read, a witness for the plaintiffs, testified that he had been President of the City Bank of New Haven for the then last nine or ten years; that F. Bradley was Cashier until October, 1857; that he was introduced, in July, 1851, to John W. McMillen by a letter from the Cashier of the American Exchange Bank, New York, which letter was produced and read in evidence.

That "an application was made for a loan for $50,000 from the City Bank of New Haven to the Bank of Akron; the arrangement was closed in July, 1851; the rate of interest settled upon; an arrangement was made to send the money in installments; the nature of the securities was arranged; the money was to be advanced at our convenience in the bills of the City

Bank; the security was to be collateral paper in the American Exchange Bank of this city, or which should be there for collection; that is, the security was the pledge of the discounted bills of the Bank of Akron which were, or which should be, placed in the American Exchange Bank for collection; Mr. McMillen was to give his notes, indorsed by himself as Cashier of the Bank of Akron. * * Mr. McMillen offered security; he offered the notes of the Bank; I doubted the power or right of the Bank of Akron, whether it was competent for the Bank of Akron, and so stated to Mr. McMillen, to give their paper; I objected to it in that form; Mr. McMillen said he could obviate that objection by giving his own note, and indorsing it as Cashier; he said he had full authority from the Bank for that purpose; this loan was to be made for one year; before the loan was made, I received a written communication in relation to it. The following is the letter:

"BANK OF AKRON,
"Ohio, July 30, 1851.

E. C. READ, Esq., Prest., New Haven:

"Dear Sir—We will borrow of your Bank fifty thousand dollars of its issues for the term of one year, with interest, payable semi-annually, at the American Exchange Bank, New York, at the rate of four per cent per annum, and protect the same by a credit in the Am. Ex. Bank, to your acct., on its being advised by you each week, of the amount of such circulation redeemed by you, the circulation to be marked to identify it, say by the figure '2,' in red ink; the amount to be furnished by you as fast as your convenience will allow; and packages to be delivered at the office of the 'American Express Co.,' in New York, to my address, care of Y. C. Severance, Cash., Cleveland, Ohio, and to be at my risk, and expense from New York; as soon as the whole $50,000 is delivered, I will furnish you with a proper note and receipt for the whole sum, in the meantime will advise the receipt of the several packages by letter.

"Very respectfully, &c.,
"J. W. McMILLEN, Cashr."

* * "We commenced sending [the bank notes] in August, 1851, the 10th or the 11th, and sent it in installments of from

$4,000 to $6,000, and we ended sending in Jan., 1852; we received acknowledgments of the receipt of the money by letters; the following letters were the ones:"

The letters were read in evidence, and were numerous; the heading of them was printed; on some of them it was:

"STATE BANK OF AKRON,
"BANK OF AKRON,
"AKRON, OHIO," ——— ——— ———

On the others it was "BANK OF AKRON," and they were all signed "J. W. MCMILLEN, Cash."

One of these letters, dated September 21, 1851, (among other things,) says: "As desired, I inclose order to Cashier Meigs for the collaterals, which I drew up hastily, and if not in proper form please dictate one and return to me the inclosed. I presume, however, it is just what you want. Our collection paper in the hands of the American Exchange Bank is seldom below $200,-000, at this time it is about $300,000, and has been so the last two months; our cash balance is over $40,000." The order referred to was read in evidence, and is as follows:

"STATE BANK OF OHIO,
"BANK OF AKRON,
"Akron, Ohio, Sept. 26th, 1851.

"CHAS. A. MEIGS, Esq., Cash., N. Y.:

"Dear Sir—Fifty thousand dollars of the collection paper held by you at any time for account of this Bank, is pledged as collateral security to the City Bank of New Haven, for that amount of money loaned by said Bank to this Bank on the notes of J. W. McMillen, indorsed by J. W. McMillen, Cashr., payable one year after date, and I have agreed that the amount of collection paper in your hands shall at no time be less than our indebtedness to the said City Bank.

"J. W. MCMILLEN, Cash."

The evidence of Mr. Read, (with other evidence given,) tended to show that this order was placed in the hands of Mr. Meigs,

who said "he would hold it subject to the claims of the American Exchange Bank." That subsequently, the City Bank of New Haven requiring security for a larger amount, another order was sent in a letter dated January 12, 1852, signed "J. W. McMillen, Cash.," (also read in evidence): The second order is in these words:

"STATE BANK OF OHIO,
"BANK OF AKRON,
"Akron, Ohio, Jan'y 12, 1852.

"CHAS. A. MEIGS, Esq., Cash., New York:

"Dear Sir—Sixty thousand dollars of the collection paper held by you at any time for account of this Bank is pledged as collateral security to the 'City Bank of New Haven' for fifty thousand dollars, of money loaned by said Bank on the notes of J. W. McMillen, indorsed by J. W. McMillen, Cashier. And I have agreed that the amount of collection paper in your hands shall, at no time, be less than sixty thousand dollars, so long as said indebtedness shall exist.

"Very respectfully,
"J. W. McMILLEN, Cash."

The letter of January 12, 1852, (among other things,) says: "I now hand order on Cashier Meigs to hold sixty thousand dolls. of the paper in his hands, at any time, as security for $50,000 borrowed of you, and will thank you to have him return to me the letter of 26th Sept., pledging $50,000.

"I inclose memorandum of agreement, that I suppose expresses our intended arrangement; if not, alter it so as to do so, and return to me."

The evidence further tended to show that such memorandum of agreement was adopted and signed in duplicate, the one signed on behalf of the plaintiffs reading thus:

"Whereas, 'The City Bank of New Haven' has loaned to J. W. McMillen, fifty thousand dollars, in the notes of said City Bank, marked '2,' in red ink, for which loan the said McMillen has given his several notes, indorsed J. W. McMillen, Cashier, bearing interest at the rate of four per cent per annum, dated and payable as follows:

"One dated August 11, 1851, in one year thereafter, for	$6,000
One dated August 19, 1851, in one year thereafter, for.....	6,500
One dated August 26, 1851, in one year thereafter, for.....	4,000
One dated September 1, 1851, in one year thereafter, for ...	4,000
One dated September 8, 1851, in one year thereafter, for ...	4,500
One dated September 15, 1851, in one year thereafter, for ..	4,500
One dated September 22, 1851, in one year thereafter, for ..	5,000
One dated September 27, 1851, in one year thereafter, for ..	1,500
One dated November 8, 1851, in one year thereafter, for ...	4,000
One dated January 15, 1852, on demand, for	5,000
One dated January 22, 1852, on demand, for	5,000
Making a total of fifty thousand dollars,..........	$50,000

"For the payment of which notes, according to their tenor, the bills receivable of the Bank of Akron, now or hereafter lodged with the American Exchange Bank of New York, for collection, to the value of sixty thousand dollars, are pledged as collateral security; as a condition of this loan it is agreed that the Bank of Akron will redeem the notes marked '2,' in red ink, of the City Bank of New Haven, at the American Exchange Bank, in New York, as frequently as they may be returned to the said City Bank. Now, it is understood and agreed, that the said loan is to be continued for one year from the dates, respectively, of the above notes given therefor; but if the said Bank of Akron shall fail to redeem the said notes, marked '2,' in red ink, of the City Bank, as agreed, then this arrangement shall cease and each of the notes given for said loan shall become due and payable on the day the Bank shall refuse to redeem the notes of the City Bank, aforesaid, as agreed; and from the day of such refusal, interest at the rate of six per cent per annum shall be reckoned and paid to the time of the repayment of the loan.

"New Haven, January 22, 1852.

"EZRA C. READ,
"Prest. of City Bank."

He further testified, that the notes mentioned in the agreement of the 22d of January, 1852, remained outstanding until the beginning of 1853, when they were surrendered, and a note was taken in lieu of them, which reads as follows:

"$50,000. AKRON, Ohio, Feb. 1st, 1853.

"On demand after date, I promise to pay to the order of J. W. McMillen, Cashier, fifty thousand dollars, at the American Exchange Bank, New York, with interest at the rate of four per cent per annum, payable semi-annually, value received.

"J. W. MCMILLEN."

Mr. Read further testified, that "the bank notes were redeemed up to the middle of November, 1854; they were first returned to the City Bank, and there redeemed; they were kept until they amounted to parcels of $1,000, and then we sent them by express to the Bank of Akron, and received from the American Exchange Bank the amount we paid for their redemption for the Bank of Akron; the American Exchange Bank made payment on the behalf of and for the Bank of Akron; since November, 1854, they have been redeemed by the City Bank of New Haven; some have been retained and some destroyed; we have received nothing since from the American Exchange Bank or the Bank of Akron." * * "Up to the 10th or 11th of November, 1854, no default was made in making the redemption; then the American Exchange Bank refused to redeem; I made a demand on the American Exchange Bank to redeem a package of our bills, about the 10th of November." * * "I do not recollect the terms of the refusal, but was, as I understood it, that it would not redeem; they said the account would not justify it."

The bills, (on which this suit is brought,) were taken by the plaintiffs from the American Exchange Bank on the 11th of November, 1854, by virtue of the order of January 12, 1852. In April, 1855, when this suit was commenced, the balance of the loan made by the plaintiffs, and then remaining unpaid, was $20,000, with interest from the 1st of October, 1854.

When the plaintiffs rested, the defendant moved for a nonsuit on various grounds (which need not be stated). The motion was denied, and he excepted.

The defendant examined as witnesses on his part, W. S. C. Otis, who was a Director and President of the Bank of Akron, from the 1st of January, 1846, until January, 1854, when he removed from Akron, and J. W. McMillen was appointed President, and A. M. Eberman, Cashier; also Joshua F. Shaw and

Milton W. Henry, who were Directors from the time the Bank was organized until it suspended; also Amos M. Eberman, who acted as Teller from August, 1848, until he was appointed Cashier; also, C. P. Wolcott, who was Attorney of the Bank of Akron for three or four years, and its President from the 16th of November, 1854, until it suspended.

Their evidence tended to show that no Director of the Bank of Akron, knew or supposed, prior to the 16th of November, 1854, that any of the plaintiff's bills had been borrowed by McMillen on behalf of the Bank of Akron, or that he had attempted to pledge any of the assets of the latter Bank to secure the repayment of such loan, and that he had no express authority to do either of such acts; and that the money so borrowed of the plaintiffs was not used by McMillen for or on account of the Bank of Akron.

Mr. Otis testified that, according to his recollection, he noticed in the fall of 1851, that McMillen was receiving and paying out, at the counter of the Bank, (amongst other foreign bills,) "the notes or bills of the City Bank of New Haven, marked with some figure in red ink, when he cautioned said McMillen against receiving or paying out the small notes or bills of other banks, as the same was against law, when he replied, that he was receiving" and paying out said notes as the Treasurer of the Akron Branch Railroad Company, of which he was the Treasurer.

The sixth cross-interrogatory put to each of these five witnesses (they having been examined upon commission), is in these words, viz.: "Who had the principal management and direction of the business of said Bank of Akron from the 1st day of January, 1851, until it was enjoined, or suspended business?"

The answer of Mr. Otis to it is, "That during the whole time he (Mr. Otis) was connected with said Bank, he was engaged in the practice of his profession; that sometimes he was frequently in the Bank, and sometimes he was absent several days, and even several weeks in succession, and the principal management and direction of the Bank devolved upon McMillen."

Mr. Shaw's answer is: "J. W. McMillen."

Mr. Henry's answer is, that "J. W. McMillen had the principal management of said Bank up to the time of his resignation, under the control of the Directors of said Bank."

Mr. Eberman's answer is thus: "He saith, J. W. McMillen, up to the time when C. P. Wolcott was appointed President of the said Bank."

Mr. Wolcott, for answer to it, says: "J. W. McMillen, until a short time before the suspension of the Bank, when I took control of it."

Mr. Eberman also testified, that "the books of the Bank of Akron show the following balance in favor of Mr. McMillen, at the times specified below, viz.:

"1851.	Sept. 1,	balance due J. W. McMillen, ...	$12,822 85
	Oct. 1,	" "	20,479 02
	Nov. 1,	" "	38,184 80
	Dec. 1,	" "	17,146 44
1852.	Jan. 1,	" "	43,738 30
	April 1,	" "	1,102 04

Also the following balances against J. W. McMillen, viz.:

1852.	Feb. 1,	....	$334 20
	March 1,	....	4,136 62"

The defendant's counsel read in evidence the following stipulation, viz.:

"1. It is hereby agreed that it shall be admitted, on the trial of this action, that the plaintiff, at the several times in the pleadings referred to, was, and now is, a corporation duly incorporated under the laws of the State of Connecticut.

"2. That the American Exchange Bank, referred to in the pleadings, was, at the several times therein referred to, a corporation duly incorporated under the laws of the State of New York.

"3. That the Bank of Akron, referred to in the pleadings, at the several times therein referred to, previous to the 23d day of November, 1854, was a corporation duly incorporated under and by virtue of the laws of the State of Ohio, entitled an act to incorporate the State Bank of Ohio, and other Banking Companies, passed February 24th, 1845.

"4. That, on the said 23d day of November, 1854, the said The Bank of Akron committed an act of insolvency, by refusing to pay in gold or silver coin, the lawful currency of the United

States, certain of its notes of circulation, on which payment was lawfully demanded, at the banking house of the said The Bank of Akron, during usual banking hours."

The defendant's counsel then read in evidence, the following sections of an act entitled an act to incorporate the State Bank of Ohio, and other Banking Companies, passed February 24th, 1845, from the printed laws of the State of Ohio.

"1.—*Upon Effect of Insolvency, &c.*

"§ 24. *If any branch refuses to redeem its notes, it shall be deemed insolvent.* If any branch of the State Bank of Ohio shall refuse to pay its notes of circulation, or any of them, in gold or silver coin, the lawful currency of the United States, in which payment shall be lawfully demanded at its banking house, or customary place of doing banking business, during usual banking hours, such branch shall be deemed to have committed an act of insolvency, and thereupon all its property, credits, securities, liens and assets of every description, shall forthwith vest in, and be the property, credits, securities, liens and assets, of the Board of Control, for the uses and purposes declared in this act.

"§ 16. *Board of Control, a body corporate until the 1st day of May*, 1866. The Board of Control, from the time of its organization until the first day of May, in the year one thousand eight hundred and sixty-six, and thereafter, until the affairs of the several branches of the State Bank of Ohio shall be finally closed up, shall be a body corporate, with succession, and by the name of the State Bank of Ohio, capable of contracting and of prosecuting, and defending in suits or actions at law, or in chancery, as fully as natural persons, and of doing all other acts and things necessary to effect the object contemplated in this act by the formation of said board.

"2.—*Power of Directors.*

"§ 49. *The number and qualifications of directors.* The affairs of every Company, formed and organized to carry on the business of banking under the provisions of this act, shall be managed by not less than five, nor more than nine directors. Every director shall, during his whole term of service, be a citizen of the United States, and a resident of this State. At least three-

fourths of the directors shall have resided in this State two years next previous to their election as directors; each director shall own in his own name and right, at least one per centum of the capital stock of the Company, up to two hundred thousand dollars, and the half of one per centum on its capital, over two hundred thousand dollars. The directors of each Banking Company, collectively, shall own at least one-tenth of its capital stock. Each director shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the Company, and not knowingly violate, or willingly permit to be violated, any provisions of this act; that he is the *bona fide* owner, in his own right, of the stock standing in his name on the books of the Company, and that the same is not hypothecated, or in any way pledged as security, for any loan obtained, or debt owing; which oath, subscribed by himself, and certified by the magistrate before whom it is taken, shall be filed and carefully preserved in the office of the Recorder of the county in which the Banking Company is located.

"3.—*Bills, &c., not Assignable.*

"§ 64. All notes, bills, and other evidences of debt, excepting bills of exchange, discounted by any Banking Company, shall be made by the terms thereof, or by special indorsement, payable solely to such Company; and no such evidence of debt shall be assignable, except for collection, or for the following purposes:

"*First.* To pay and redeem the circulating notes of such Company.

"*Second.* To pay other liabilities of the said Company; and, after such liabilities shall have been discharged.

"*Third.* To divide among the shareholders on their stock.

"§ 66. *Directors knowingly violate any of the provisions of this act, charter forfeited.* If the directors of any Banking Company which shall have availed itself of any of the privileges granted by this act, shall knowingly violate, or knowingly permit any of the officers, agents or servants of such Company to violate any of the provisions of this act, all the rights, privileges and franchises of said Company, derived from this act, shall thereby be forfeited; such violation shall, however, be determined and ad-

justed by a Court of competent jurisdiction, agreeably to the laws of this State, and the practice of such Court, before the corporation shall be declared dissolved; and in case of such violation, every director who participated in, or assented to the same, shall be held liable in his personal and individual capacity for all damages which the Company, its shareholders, or any other persons, body politic or corporation, shall have sustained in consequence of such violation.

"4.—*Illegal to Circulate Foreign Bank Notes.*

"§ 68. *Not to pay out depreciated notes.* No Banking Company shall, at any time, pay out on loans, or discounts, or in purchasing of drafts or bills of exchange, or in payment of depositors; nor shall it, in any other mode, put in circulation the notes of any Bank or Banking Company, either in or out of this State, which notes shall not, at that time, be receivable at par in payment of debts, and by the Company so paying out or circulating such notes; nor shall it knowingly pay out or put in circulation, any notes issued by any Bank or Banking Company which at the time of such paying out or putting in circulation is not redeeming its notes in gold and silver; nor any notes issued by any Bank, out of this State, of a denomination less than five dollars."

The defendant's counsel also read in evidence from the same volume the following sections of an act entitled an act to amend the act supplementary to the act to prevent unauthorized banking and the circulation of unauthorized Bank paper, passed February 24th, 1848.

"§ 1. *Notes of Banks of other States not to be paid out by Banks of this State for circulation. Be it enacted, &c.* That it shall be unlawful for any Bank or incorporated Company doing a banking business, or dealing in money as a business, or exchange broker, money broker, or private banker, or other person or persons who shall receive money on deposit, or buy or sell bills of exchange, or loan money, or exchange one kind of Bank bills or money for another, with a view to profit, to issue, pay out, or give in exchange for other money so as to go into circulation in this State, any circulating notes or bills, except the notes or bills of the Banks of this State, issued according to law.

"§ 4. *Notes purchased in violation of section* 1, *null and void.* Every note, bond, bill of exchange, draft, check, or other evidence of debt, discounted, bought or otherwise obtained by any Bank, corporation, private Company or individual, described in the first section of this act, and paid for in whole or in part in Bank notes described in the first section, contrary to the true intent and meaning of this act, shall be held and adjudged null and void; and no suit or action for the recovery thereof shall be sustained by any Court in this State; and all contracts, promises and agreements, founded in whole or in part on the payment, exchange or putting forth of such Bank notes, contrary to the provisions of this act, shall be held and adjudged utterly null and void."

The defendant's counsel then rested.

The plaintiffs' counsel then called as a witness,

John W. McMillen, who having been first duly sworn, testified as follows: "I was formerly connected with the Bank of Akron; I was Cashier from 1845 to February, 1854; then I was President until November, 1854; while I was an officer I was a stockholder and director; W. S. C. Otis was President until January, 1854; he resided at Akron; he was a lawyer.

"*Q.* What knowledge had Mr. Otis of the business of the Bank from July, 1851, to 1854?

"*A.* He gave very little time and attention to the business of the Bank.

"*Q.* How frequent during the time you speak of was Mr. Otis present at the Bank?

"*A.* I could not state how frequently; he was absent from home a good deal; and when home did business with the Bank as other individuals did; he was a member of the State Convention, and practised in the various Courts.

"*Q.* When he came to the Bank, what part did he take in the transaction of its business?

"*A.* He took no part in the transaction of the business.

"*Q.* What examination or investigation into the business which had been done by the Bank did he make?"

To each of these questions, when put, the defendant's counsel objected. The Court overruled each objection, and the defendant's counsel excepted to each decision.

The witness answered: "Not any; he was a director during the time he was President; the Board of Directors met generally in January and July; when the directors met in January and July, statements of the Bank's business and a balance sheet were placed before them."

The plaintiffs' counsel then asked the witness the following question:

"*Q.* What other business was done at those meetings?"

The witness answered: "At January meetings officers and directors were elected and dividends were declared; in July, among other things, dividends were declared; I don't recollect anything else in particular; I presume there was other business might have occurred that I don't recollect; the Bank made discounts and purchased exchange in the form of bills and notes; I did that business while I was Cashier; the Bank, from time to time, borrowed money; I borrowed for it; Joshua F. Shaw was a Director; he resided in Norton, about ten miles from Akron; he was there usually at the semi-annual meetings of the board, and some other times; when he came to the Bank he examined the balance sheet, perhaps; when he came to the Bank at other times than the semi-annual meetings, I do not recollect that he made any examination; he would draw his checks; Milton W. Henry was a Director; resided in Akron; he was there at the Bank every day transacting business, as a dealer; nothing else was done by him except at the regular meetings; while I was Cashier Amos M. Eberman was Teller, from 1848 to February, 1854; had another Teller and Bookkeeper part of the time; Eberman kept the books; Christopher P. Wolcott was Attorney of the Bank up to February, 1854; then he became Director, and afterwards President; I obtained from the City Bank the loan referred to; I made the application in New Haven; up to that time I had no knowledge of, or acquaintance with, that Bank or any of its officers; I made the acquaintance through the American Exchange Bank; when I made that application I asked to have the loan made to the Bank of Akron; I offered, as collateral security, the notes and bills of exchange of the Bank of Akron, in the American Exchange Bank for collection; as to the form of the security or evidence of the indebtedness, I think I first proposed to give a time draft of the Bank of Akron; it was

objected to on their part, that there was some doubt whether a Bank could issue time paper; it was finally agreed that I should give my own note, indorsed by the Bank of Akron, and collateral securities; I wrote the July letter; I received the money spoken of yesterday to the amount of $50,000, at the Bank of Akron, through the American Express Company, in packages, addressed either to The Bank of Akron or to J. W. McMillen, Cashier; at first they were sent to the care of Y. C. Severance, Cashier; they were sent to Severance, at Cleveland, because we had no express to Akron; afterwards we had one, and they were sent direct; packages received were opened by the Teller, Eberman; the bills were kept in the vault except when paying them out during the day; the correspondence was received at Akron, through the Post Office; these letters were usually addressed to the Cashier; when the correspondence was received it was addressed to the Cashier; if I was there I opened it; if not the Teller opened it; the letters were read and filed away, and kept in the pigeon holes in the Bank; these letters, in relation to this transaction, were kept with the rest; of the letters that were sent in reply, copies were kept; taken by letter-press.

"Were copies of these letters kept?

"It was usual to keep copies; I presume copies of these letters from me, (which are here produced,) were taken as the others were.

"*Q.* All kept in regular books?

"*A.* I know nothing to the contrary; that was the custom; the $50,000 note was made and indorsed by me; the letter of the 30th of July contained the arrangement." * *

When both parties had rested, the Court directed the jury to render a verdict for the plaintiffs.

To which direction and charge, the defendant's counsel excepted. The jury thereupon rendered a verdict for the plaintiffs for $36,541.95.

"The Court then ordered that judgment be suspended, and that the questions of law arising herein be heard, in the first instance, at the General Term, upon a case to be made by defendant."

Some other portions of the evidence given are stated in the opinion of the Court.

At the February General Term, 1859, the defendant moved, upon the exceptions, for a new trial; and the plaintiffs moved for judgment in their favor on the verdict.

William Stanley, for defendant.

I. The loan made by the City Bank of New Haven to the Cashier of the Bank of Akron, was not valid or binding upon the latter Bank. The Cashier of a Bank, as such, has no power to borrow money for the Bank. That is a power intrusted exclusively to the Board of Directors. A Cashier, or any other agent, undertaking to exercise such a power, must produce a special authority from the Board of Directors for that purpose. (*Hallowell and Augusta Bank* v. *Hamlin*, 14 Mass., 180; *Hartford Bank* v. *Barry*, 17 id., 97.)

If the money borrowed had been applied to the use of the Bank, and the benefit of the loan thus received and retained, that might have amounted to a ratification of the loan. But it was proved, without contradiction, that the money was in fact borrowed by the Cashier for his own private use, and no part of it was ever applied to the use of the Bank.

II. Assuming the loan to have been valid and binding, the Cashier had no power to pledge the property of the Bank as security for its repayment. The fact that the property consisted of negotiable paper is wholly immaterial, the rights of a subsequent *bona fide* holder not being in question. (*Hoyt* v. *Thompson*, 1 Seld., 320.)

III. The plaintiffs were not purchasers of the bills sued on for a valuable consideration. The money was all advanced before the bills were received, and no value or right was parted with on the faith of them. It will be contended that the bills were received in pursuance and in execution of a previous contract. But this does not make the plaintiffs purchasers for value within the meaning of the rule. The contract was not applicable to any particular bills; and it appears that the President of the City Bank selected such as he chose. It is impossible that the mere election of the plaintiffs to take these bills, instead of others, should make them a purchaser for value. (*Stalker* v. *McDonald*, 6 Hill, 93.)

IV. The contract between the plaintiffs and the Cashier of the Bank of Akron was illegal and void, as being in violation of the

law of Ohio, where it was to be performed. The plaintiffs, there fore, acquired no title to the bills sued on.

The case of *Dewitt* v. *Brisbane*, (16 N. Y., 508,) is directly in point to show that such would be the result upon a suit brought in the State of Ohio. The case of *Hyde* v. *Goodnow*, (3 Comst., 269,) is in point to show that our Courts will give the same effect to the laws of Ohio that the Courts of Ohio would do, even as against our own citizens. Much more will they do so in the present case, when a citizen of Connecticut sues a citizen of Ohio, in this State. The proof is clear that the plaintiffs had full notice that they were violating the law of Ohio, though *Dewitt* v. *Brisbane* shows such proof to be unnecessary.

Wm. Curtis Noyes and *B. W. Bonney*, for the plaintiffs.

I. The bills in suit were respectively accepted and indorsed by the defendant, and regularly discounted by the Bank of Akron. The defendant owes the amount of those bills, and admits his indebtedness, but denies that plaintiffs are the lawful holder of the bills or entitled to collect them. So far as appears in this action, he is the only person who questions plaintiffs' title.

II. It is conclusively proved that the plaintiffs, in February, 1851, at New Haven, in Connecticut, agreed to lend to the Bank of Akron $50,000, on the security of a pledge of bills of exchange belonging to the Bank of Akron, and sent to the American Exchange Bank, in New York, for collection. That the sum of $50,000 was, pursuant to such agreement, advanced and lent by the plaintiffs to the Bank of Akron, and, by order or letter addressed to the American Exchange Bank, bills of exchange discounted by and belonging to the Bank of Akron, sent to the American Exchange Bank for collection, to the amount of $60,000, were duly pledged to plaintiffs, to secure the payment of said loan. That in October, 1854, $20,000 of said amount loaned remained due to plaintiffs, and the bills in question, which belonged to the Bank of Akron, and had been sent to the American Exchange Bank for collection, were received by the plaintiffs from the American Exchange Bank under said pledge, and are now sought to be collected by the plaintiffs as such pledgees.

III. The bills in question are all regularly indorsed, and plaintiffs' *prima facie* title thereto is perfect.

IV. The pledge, made to the plaintiffs by the Bank of Akron, authorized the plaintiffs, at any time before the said loan was paid off, to take and receive from the American Exchange Bank bills of exchange belonging to the Bank of Akron, sent to the American Exchange Bank for collection, to an amount not exceeding $60,000, and, as such pledgees, to demand and collect such bills of exchange, as the lawful holders thereof.

V. John W. McMillen, Cashier of the Bank of Akron, had, as such Cashier, authority to borrow money for the use of said Bank, and to secure the repayment of the loan by pledge of the bills of exchange or other property of such Bank. (*Curtis* v. *Leavitt*, 15 N. Y. R., 51, 62–66, 169, 219–223, 262, 267–270; *Lafayette Bank* v. *State Bank of Illinois*, 4 McLean's R., 208; Angell & A. on Corp., 5th ed., §§ 299, 300; *Bank of Vergennes* v. *Warren*, 7 Hill, 91; *Com. Bank of Buffalo* v. *Kortright*, 22 Wend., 348; *Hartford Bank* v. *Barry*, 17 Mass. R., 94; *Folger* v. *Chase*, 18 Pick., 63.)

Besides his implied authority as Cashier, it is proved that said Cashier, at the time of the transaction in question, was intrusted with and exercised the control of the Bank of Akron, and the management of all its business.

VI. The contract for the loan in question was made at New Haven, in the State of Connecticut, and with reference to the laws of that State, and there the money was to be repaid.

The contract must be construed and its legality determined by the laws of the place where the contract was made, and where it was to be performed. (*Curtiss* v. *Leavitt*, 15 N. Y. R., 91, 230, 296, and cases there cited; *Babcock* v. *May*, 4 Ohio R., 334, 348; *Van Cleef* v. *Therasson*, 8 Pick., 12.)

VII. There is no allegation or pretense that the contract between the plaintiffs and the Bank of Akron violated any law of the State of Connecticut, or would be in that State invalid, or that any right or interest of the State of New York, or of its citizens, can be thereby injured or impaired.

The Courts of the State of New York will, therefore, enforce the contract. (*Merchants' Bank* v. *Spalding*, 12 Barb., 302; *S. C.*, 5 Seld., 53; *McIntyre* v. *Parks*, 3 Metc., 207; *Pellicat* v. *Angell*, 2 Cromp., Mees. & Rosc., 311; 15 N. Y., 101, 231; 4 Kern., 162.)

VIII. There is no proof or ground for pretense that the plaintiffs, in the transaction with the Bank of Akron, intended to violate any law of the State of Ohio, or did any act intentionally to promote or aid any such violation; or even had knowledge that, by any law of the State of Ohio, the circulation of the bills of foreign Banks by the Banks of Ohio was prohibited, and this action would be sustained in Ohio. (*Merchants' Bank* v. *Spalding*, 5 Seld., 53–63.)

IX. The Court will not be astute to so construe the law or apply the evidence as to sustain the defense in this action. It is proved, and not denied, that the defendant owes the amount of the bills in suit, and that the plaintiffs hold them for full consideration paid in good faith.

The defense is, therefore, unjust and inequitable, and, to be successful, must be fully and strictly made out. Every intendment will be against it.

X. There was no error in any ruling or decision of the Judge presiding at the trial, nor in his direction to the jury to render a verdict for plaintiffs.

Judgment should now be rendered for plaintiffs for the amount of the verdict, with interest and costs.

BY THE COURT—BOSWORTH, Ch. J. The drawing, accepting and indorsing of the bills, as alleged in the complaint, except the indorsement of them by the American Exchange Bank to the plaintiffs, are admitted by the pleadings. The indorsement to the plaintiffs, by that Bank, was proved at the trial, and thus the apparent legal title in the plaintiffs was established.

Whether the plaintiffs are the legal owners and holders of the bills, or whether they continue to be the property of the Bank of Akron, depends upon the authority of J. W. McMillen, the Cashier of the Bank of Akron, to transfer them to the plaintiffs as they were transferred, and whether the contract as part of which the transfer was made is valid, or void as being prohibited by any law of Ohio by which the plaintiffs' title can be affected.

The defendant has no defense to a suit upon the bills, by and in the name of the lawful owner of them. His defense is based solely on the alleged absence of any lawful title in the plaintiffs,

and on the allegation that the Bank of Akron is the true and lawful owner.

In July, 1851, McMillen, then being Cashier of the Bank of Akron, applied, as such Cashier, to the plaintiffs for the loan of $50,000, of their bills, to the Bank of Akron, for the term of one year.

The plaintiffs agreed to make the loan to the Bank of Akron, upon the terms; of interest at the rate of four per cent, payable and to be paid semi-annually at the American Exchange Bank, New York, and of the bills so lent, being redeemed weekly at such Bank by the Bank of Akron, as they should be returned to the plaintiffs, and of $60,000 of the collection paper belonging to the Bank of Akron, and held at any time by the American Exchange Bank, being pledged as collateral security to the plaintiffs, and that while such loan continued there should be at no time less than $60,000 in amount of such paper held by the American Exchange Bank.

A paper directed to the Cashier of the American Exchange Bank, and signed by McMillen as Cashier of the Bank of Akron, stating the fact and terms of such pledge, was delivered to the plaintiffs, and notice of it was given to the Cashier of the American Exchange Bank, who assented to it and agreed to hold the paper so pledged, subject to any claims of the Bank, of which he was Cashier.

The bills to be so loaned were to be marked in a manner agreed upon to secure their identification, and were to be furnished to the Bank of Akron, as fast as the convenience of the plaintiffs would allow.

Under this arrangement, the plaintiffs, in August, 1851, commenced sending their bills to the Bank of Akron, and in January, 1852, had forwarded the whole $50,000. They were forwarded in packages, by express, directed to McMillen, as Cashier of the Bank of Akron, and were received by him at that Bank.

As fast as the bills, after they were put in circulation, were returned to the plaintiffs, they were redeemed at the American Exchange Bank, for the Bank of Akron, and on its account, and out of its funds, and thereupon the amount thus redeemed was again returned to the Bank of Akron by the plaintiffs, in the same manner as those originally loaned had been forwarded.

The interest on the $50,000 was regularly paid semi-annually by the American Exchange Bank to the plaintiffs, for and on account of the Bank of Akron, and out of its funds. The loan was continued beyond the time originally agreed upon, and upon the terms on which it was originally made. This course of redeeming the notes, as they came back to the plaintiffs, and of re-issuing and sending to the Bank of Akron the same amount as was from time to time so returned and redeemed, and of paying interest semi-annually on the whole sum loaned, was continued until about the 11th of November, 1854. The American Exchange Bank then declined to redeem notes that had been so returned to the plaintiffs, and thereupon the plaintiffs obtained from that Bank, under the pledge and agreement in relation thereto, a transfer of collection paper held by it belonging to the Bank of Akron, amounting to a little over $59,000, and the paper so transferred included the bills on which this action is brought.

McMillen, as such Cashier, had authority to borrow money for the Bank of Akron. To what extent he borrowed for the Bank, the evidence does not disclose. He had, practically, the whole management of the business of that Bank. Its Board of Directors met semi-annually, but according to the evidence before us, did not, at those meetings, or at other times, inquire as to the details of its business, the mode of its operations, or into the manner in which the Cashier was prosecuting its business.

Under such circumstances, we think the plaintiffs are entitled to have this controversy determined upon the principle, that as between them and the Bank of Akron, the Cashier of the latter was fully authorized to borrow money for it, and in its name, and that any loan made by the plaintiffs, in good faith, on an application of the Cashier of the Akron Bank, as such Cashier, to borrow for it, is a loan to that Bank, and that such Bank is primarily liable for such loan, as the party borrowing.

In *Beers* v. *Phœnix Glass Company*, (14 Barb. S. C. R., 358–361,) it was held, that in order to make particular transactions of the officers of a corporation binding upon the corporation itself, it is not necessary to prove they were directly authorized. "If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a par-

ticular line of conduct for a considerable period, without objection, they are as much bound to those who are not aware of any want of authority, as if the requisite power had been directly conferred."

These transactions extended over a period of three years. The bills originally loaned, and those sent as a substitute for bills returned to the plaintiffs in the ordinary course of circulation for redemption, were sent to the Bank of Akron directed to its Cashier, and were received at that Bank by such Cashier.

The bills loaned, as they came back to the plaintiffs, were redeemed from time to time in the name of the Bank of Akron, by its agent in New York, the American Exchange Bank, with the funds of the Bank of Akron; and the American Exchange Bank, as such agent, also paid the semi-annual interest on the sum loaned by the plaintiffs to the Bank of Akron, and out of the funds of the latter Bank.

All the letters from McMillen to the plaintiffs relating to his transactions with them, (which are of any importance,) are either dated "Bank of Akron," or "State Bank of Ohio," "Bank of Akron, Akron, Ohio," and are signed by him as Cashier.

These letters are numerous.

It was said in *The New Hope & Delaware Bridge Company* v. *Phœnix Bank*, (3 Comst., 166,) that "a letter from the Cashier on the business of his Bank is a letter from the Bank; a letter to the Cashier relating to the business of his Bank is a letter to his Bank; and the Bank is chargeable with knowledge of the contents of such letter."

The American Exchange Bank, as it redeemed for the Bank of Akron and with its funds, from time to time, the bills returned in the course of circulation to the plaintiffs, and as it also paid interest for the Bank of Akron out of its funds semi-annually, on the sum loaned, must be presumed to have advised the Bank of Akron of the fact of such payments. There is no pretense, nor attempt to show that this was not done, nor that the Bank of Akron objected to such acts, or refused to allow such payments, or questioned the power of its Cashier to authorize or direct such payments to be made.

We think it, therefore, quite clear, that the Cashier of the Bank of Akron had authority as such to borrow money for that

Bank. That the sum loaned by the plaintiffs on the application of such Cashier to borrow for that Bank, was a loan to that Bank, and that such Bank is liable for its repayment as the principal in the transaction, and the party borrowing. And that the bills in question were transferred to the plaintiffs to enable them, by a collection of such bills and out of their proceeds, to obtain payment of a debt due to them from the Bank of Akron, and not, as the answer alleges, to obtain payment of a debt due from McMillen to the plaintiffs.

There is no force in the objection that the bills so borrowed of the plaintiffs were not, in fact, used by the Cashier of the Bank of Akron, for its benefit and in prosecuting its business, even if the evidence given, is, for the purposes of this action, to be treated as competent and sufficient to establish, *prima facie*, that fact.

The bills were borrowed for the Bank of Akron, and were loaned to it, and on its credit and on the security of a portion of its assets, and were sent by the plaintiffs to that Bank, and were received at the Bank by its Cashier, and were retained in its banking house until they were paid out at its counter.

In judgment of law, they came into the possession of the Bank of Akron as absolutely as if they had been delivered to the Board of Directors at a regular and full meeting of its members. What the Cashier or the Directors, or either of them, subsequently did with the bills, cannot impair the plaintiffs' claim, either at law or in equity.

There could be no doubt of the validity of the transfer of the bills of exchange in question, if it had been directly authorized by the Board of Directors.. There is nothing in any part of the charter of the Bank, which has been given in evidence, that prohibits the delegation of authority to the Cashier to borrow money upon such terms as the loan in question was made, or to transfer such portion of its discounted bills as may be reasonable in amount, for collection, and to pay its just liabilities out of the proceeds thereof when collected. (*The City Bank of Columbus* v. *Bruce & Fox*, 17 N. Y. R., 514, 515.)

When, as in this case, the Cashier of a Bank has actual authority to borrow money for it, and the whole management of its

business and the mode of conducting its operations are confided by the Directors to him, and so absolutely so, that his operations and mode of doing business are not examined into by them at all for years, a party who deals with and loans money to such Bank, on the faith that the acts of such Cashier, in borrowing and securing it, are authorized by his Bank, is as much entitled to protection as if such acts had been directly authorized, when such acts are of a character that it may reasonably be supposed they have been authorized by the Bank, and the business transactions between such party and such Cashier have been done openly and publicly, and in such manner that the Directors, if they had given even ordinary attention to its business, would have been informed of such transactions, and of the particulars thereof.

Especially should it be so held, when the contract sought to be enforced is one which the Bank was competent to make, and upholding it violates no rule of law or principle of public policy.

There is no pretense that the nature and extent of the authority of the Cashier of the Bank of Akron have ever been defined by any direct act of the corporation. On the contrary, he has been permitted, as being within the scope and limits of his authority, to exercise a large range of powers, and his own judgment as to the transactions which he deemed to be for the interest of the Bank, and the terms on which he should contract, in making engagements as its agent, which the Bank might lawfully make.

Such exclusive control and management for so long a period by the Cashier, with the assent of the Directors, amounts to an authority to him to make contracts, in relation to its business which the bank might lawfully make, and will conclude the Bank as between it and a party who has dealt directly with it through such Cashier, and who, on the faith of his having authority to make such a contract, has loaned money to, or paid it for such Bank.

The circumstance, that McMillen gave his own note to the plaintiffs for the sum borrowed, we regard as of no consequence under the particular facts and circumstances of this case. It cannot detract from the force of the fact that the loan was made to the Bank of Akron as the party borrowing, nor impair any obligation which it assumed by the contract made in its behalf and

in its name by its authorized agent, to repay the sum borrowed, or in relation to the securities promised, and subsequently in execution of such promise actually transferred to the plaintiffs, as the means and for the purpose of obtaining payment of the sum lent.

If the views already stated are sound, the remaining questions presented by the case can be disposed of briefly.

Such parts of the charter of the Bank of Akron as were given in evidence do not prohibit the Bank of Akron from paying out or putting in circulation any notes issued by any Bank which redeemed its notes in gold and silver, and which the Bank of Akron received at par in payment of debts, if of a denomination not less than $5.

The contract relating to the loan contains no provision conflicting with this part of the charter. It was no part of the contract that the plaintiffs should furnish, or that the Bank of Akron should receive, from them, as part of the loan, any bill of a denomination less than $5.

There is no evidence that the plaintiffs knew of the existence of the general statute of the State of Ohio, entitled, "An act to amend the act supplementary to the act to prevent unauthorized banking and the circulation of unauthorized bank paper, passed February 24, 1848," sections 1 and 4 of which are inserted in the case.

On the 9th of October, 1854, the Cashier of the Bank of Akron returned to the plaintiffs a package of 5s, amounting to $4,600, with notice that the law of Ohio prohibiting the circulation of foreign bills under 10s took effect on the 1st of that month, and "causes them to return so rapidly that we are obliged to return these, asking you to please to substitute 10s in their stead, and also for all others you may redeem hereafter."

There is, therefore, no evidence that the plaintiffs knew, or had reason to suspect, when they agreed to loan the $50,000, or when they furnished the bills to that amount under their agreement to loan, or returned bills which they had redeemed, that the Bank of Akron, or its Cashier in behalf of that Bank, intended to use the bills in a manner or for a purpose prohibited by any statute of the State of Ohio.

Whatever the undisclosed purpose or intent of such Cashier may have been, there is no ground for pretending that the plain-

tiffs stipulated, as a part of their contract, that anything should be done with the bills loaned that would violate any statute of that State.

The Merchants' Bank of New York v. *Spalding*, (5 Seld., 53,) and *Tracy* v. *Talmage, Pres't*, (4 Kern., 162,) are decisive of any defense based on the allegation of its being part of the agreement that acts should be done that would violate a known, or, in fact, any statute of the State of Ohio.

The point of the fifth defense is, that "the plaintiffs improperly got possession" of the bills of exchange on which this suit is brought, "and are attempting to collect them of this defendant," * * "and to apply the proceeds thereof to the payment of a pretended debt due from one J. W. McMillen to the plaintiffs, the consideration of which pretended indebtedness arose out of certain Bank notes of the plaintiffs, which said McMillen *agreed to circulate for the plaintiffs in the State of Ohio, illegally and contrary to the statutes of the State of Ohio.*"

What the terms of these statutes or their titles are, or when they were passed, is not alleged nor intimated. Nor are the terms of the alleged agreement, as to circulating the plaintiffs' bills, stated either in detail or generally.

No agreement to actually circulate is proved. It was undoubtedly expected that they would be paid out in Ohio, and the circulation obtained that might result from such an act. But there was no agreement in respect to the fact of circulation.

No statute is proved, of which the plaintiffs are shown to have had any knowledge or notice, which could have been violated by the circulation of any bills which the plaintiffs agreed to furnish, or, at the time of making the contract, were asked to furnish under it.

The plaintiffs hold the bills of exchange sued upon as regular indorsees, and are attempting to collect them to obtain payment of a debt justly due to them from the Bank of Akron. They were delivered to the plaintiffs under a written authority and pledge of them, or a pledge which operated upon them from the moment of such delivery, formally executed by the Cashier of that Bank, upon the faith of, and in reliance upon which pledge, the loan has been continued and extended from one year to three years in duration.

The plaintiffs, if the views we have expressed are correct, did not "improperly get possession" of these bills of exchange, but, on the contrary, obtained possession of them lawfully and for a just purpose, and are attempting to collect them to satisfy a valid debt owing to them by the Bank of Akron.

They should not be defeated in their action to recover upon them, upon the evidence given at the trial in support of the issues raised by the defendant's answer.

The motion for a new trial must be denied, and a judgment in favor of the plaintiffs entered on the verdict.

Judgment ordered accordingly.

DAVID OGDEN, Plaintiff and Respondent, *v.* THE NEW YORK MUTUAL INSURANCE COMPANY, Appellants.

1. Where, by the terms of a policy of insurance, all passage money received by the insured, (the owners of a vessel named,) for passengers on board said ship for a voyage specified, is insured; and subsequently such vessel sails on the specified voyage, with passengers who have paid passage money to the amount of $6,395; and the vessel and passengers are lost by the perils insured against; the insured is not entitled to recover without proof of other facts.
2. He cannot recover without proof that by the contracts with such passengers, the passage money was to be refunded wholly or in part in case of a failure to deliver them at the port of destination; or unless it appears that on the facts shown to exist, the insured is liable to refund such passage money, or some part of it.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, December 14, 1858; decided, April 9, 1859.

APPEAL by the New York Mutual Insurance Company, the defendants, from a judgment in favor of David Ogden, the plaintiff, rendered on a trial had on the 21st of June, 1858, before Mr. Justice PIERREPONT, without a jury.

The action was commenced in June, 1857, and is brought to recover (on a policy of insurance made by the defendants,) the amount paid to the plaintiff by passengers per ship Driver, for

their passage money, which ship sailed from Liverpool for New York, February 12th, 1856, and has not since been heard of.

The policy is dated January 18th, 1855, and by it the defendants insure the plaintiff, "David Ogden, on account of whom it may concern, in case of loss to be paid to him, * * lost or not lost, at and from Liverpool to New York; on all passage money received by A. Taylor & Co., or by their agents in Liverpool, for passengers on board the ships Driver (and six other ships named) to any amount not exceeding $50,000 in the aggregate, and all risks to attach as soon as said passengers are engaged and paid for. Amount of passage money by each ship to be named to the company as soon as ascertained; * * and in case of detention by any of the perils insured against, whereby the passengers' fare or charges becomes a charge to the underwriters, it is to be estimated at not exceeding, for first cabin passengers, $1 per day; second do., $0.50; steerage, $0.30. And when other passengers are substituted for the first, the new earnings are to be deemed salvage to the original underwriters, allowance being made for additional fare as above. This policy to be deemed continuous until otherwise directed by either party, due notice to be given. In case of any claim made, the pound sterling to be valued at five dollars, premium included."

The policy, in other respects, is the usual cargo policy.

The defendants, by indorsements made from time to time on the policy, increased the amount insured under it, viz.: $25,000 July 15, 1855; $25,000 October 22, 1855; $25,000 April 25, 1856; $25,000 May 31, 1856; and $25,000 November 7, 1856; the following being part of the last indorsement, viz.: "Risk not to attach until passengers are on board."

The complaint states the making of the policy; describes it; the increased amounts of insurance; that the ship Driver sailed from Liverpool for New York, on the 12th of February, 1856, having on board 344 passengers who, before that time, had paid to A. Taylor & Co. their passage money, amounting in all to $6,395; that said ship, by the perils insured against, had sunk and gone to the bottom, and all the passengers had been lost, and no part of the passage money had been earned. Notice to the Company of the sailing of said ship, and of the amount of passage money thereby; notice to the Company of the loss and furnish-

ing proof of the same, on the 12th of February, 1857; and prays judgment for $6,395, and interest from the 12th of February, 1857.

These are the only allegations of substance contained in the complaint. They were proved at the trial to be true; except that the proof of loss of the vessel and passengers consisted of evidence that neither had been heard from. It was proved that the ship, when she sailed, was "tight, staunch, well manned, stored and provisioned for said voyage, and in all respects seaworthy." That the plaintiff was agent of and made the insurance for the owners of the ship; that the firm of A. Taylor & Co. resided in Liverpool, and were agents for the ship Driver in February, 1856, and received the passage money paid by the passengers, amounting in all to $6,395; that the interest thereon is $605.86, making a total of $7,000.86.

When the plaintiff rested, the defendants moved for a nonsuit on the grounds—1st, that the plaintiff had not proved facts constituting a cause of action; 2d, that the plaintiff has received the passage money and proved no loss.

The Court denied the motion, and ordered a judgment for the plaintiff for $7,000.86. From that judgment the present appeal is taken.

Thaddeus H. Lane, for appellants.

I. The purpose of the policy is clearly indicated by taking all its parts together as modified by the written portions.

It is obviously meant to insure against any loss of passage money if the ship should be detained or be obliged to return to port, or to seek a port of refuge; or some other contingency, should occur by which the passengers should become a charge and expense to the ship; which charge and loss were to be made good by the underwriters.

1. It is well settled that the intention of the parties is to be deduced from the whole instrument, and if there is any inconsistency in a policy of insurance, the written part will control the printed words. (*Jefferson Ins. Co.* v. *Cotheal*, 7 Wend., 73-80; *Howland* v. *Com. Ins. Co.*, Anth. N. P., 81.)

II. The plaintiff admits that he has sustained no loss, but on the contrary, was paid the passage money before the vessel sailed.

According to his construction of the policy, it would be a wager as regards passage money, he having no insurable interest. There could be no risk on passage money actually received. (1 R. S., p. 662, §§ 8, 9, 10; 2 R. S., 4th ed., p. 72.)

III. The plaintiff is not liable to return any portion of this passage money. The payment by the passengers was absolute, and on the condition of being taken on board; they could not, after the voyage had been commenced, have recovered any portion of it. (*Gillan* v. *Simpkin*, 4 Camp., 241; *De Silvale* v. *Kendall*, 4 Maule & Selw. R., 37.)

1. The safe arrival of the passengers was not a condition precedent to the payment; the consideration was in receiving the passengers on board, and making due efforts to deliver them. The ship could not be compelled to refund the passage money. (*Watson* v. *Duykinck*, 3 Johns., 335.)

2. This is the universal mercantile usage. The ship is obliged to furnish stores, provisions, &c., for the passengers, and therefore exacts payment in advance as a condition of receiving them, and is not bound to refund the money; and in the absence of proof of any other contract, this usage must govern.

IV. But if this were not so, and the passengers could have recovered the passage money paid, they, the passengers, are all lost, and it does not follow, neither is it averred or proved, that they left any personal representatives, or that if they had, they had any interest, such as to recover back any portion of the passage money.

V. Even if the legal liability to refund, (if any claim against the plaintiff should ever be made,) were clear, it would not support this action. The insurance is for indemnity against the actual loss or damage, not against the possible contingency of claim and recovery

F. B. Cutting, for respondent.

I. The exception to the refusal to dismiss the complaint upon the general ground that the plaintiff had not shown sufficient facts to constitute a cause of action, does not permit the plaintiff to resort to any mere formal question or defect, or to matters of minor detail, which could probably be set right if attention were called to them. The general merits only are open for discussion,

and the above statement is sufficient to show them with the plaintiff. (20 Johns. R., 357; 7 Hill, 388; *Merrit* v. *Seaman*, 6 Barb. S. C. R., 330; 7 How. Pr. R., 410; 9 id., 27.)

II. The objection that the passage money was received, (*i. e.*, in advance, before the voyage was commenced, the vessel having been lost and no passage performed,) raises the questions, (1st,) whether any part of the passage money was earned by the mere commencement of a voyage never completed? and (2d,) whether the plaintiff must wait to be sued and compelled to return the money to the representatives of these lost passengers, before he can recover from his insurers? And both of these questions must be answered in the negative, because,

1. The policy itself contemplated only passage money received by the Liverpool agents, and the risk was only to attach after the money was paid to those agents; which assumes, that by the usual or known terms of such payments the ship-owner's right or title to that money was at the risk of, or dependent upon, performance of the voyage. It was thus the assumed basis of the whole contract, that the passage money was not earned if there was such a loss by sea perils as that the passengers could not be carried to their destination.

2. By the loss, of course the provisions, supplies and outfits used in advance for the voyage, or provided and intended for the use of the passengers and crew, or for the wear and tear of the vessel, were lost, and all the benefits or profits contemplated from the voyage, to the extent of the amount of passage money, were lost, unless the owners had a right to receive and retain this passage money, merely because paid in advance.

3. Passage money is now placed upon the same footing as freight; and is not earned without performance, although paid in advance.

As to freight. (*Phelps* v. *Williamson*, 5 Sandf., 578; [other cases as to freight collected in 2d American Leading Cases; Hare & Wallace, notes, 604–607; 1 Blatchf. R., 354; 3d Sumn., 30, 66; 4 Wash. C. C. R., 110; 13 Mees. & Wels., 230, and note to Am. ed., 240;] *Howland* v. *The Sarona*, 1 Peters' Adm., 126; *Giles* v. *Brig Cynthia*, id., 203–207; note; *The Aberfoyle*, 1 Blatchf. R., 360; *The Pacific*, id., 569; *Watson* v. *Duykinck*, 3 Johns. R., 335, special agreement; *Detouches* v. *Peck*, 9 id., 210;

Wheeler v. *Board*, 12 id., 363; *Murray* v. *Richards*, 1 Wend. R., 58; *Vanderbilt cases*, 19 Barb., 222; 21 id., 26, affirmed on appeal; *Samson* v. *Ball*, 4 Dallas, 459; *Cope* v. *Dodd*, 13 Penn. St. R., 1 Harris, 33; *Griggs* v. *Austin*, 3 Pick., 20; *Brown* v. *Harris*, 2 Gray Mass. R., 359; Angell on Carriers, §§ 531, 568, &c.)

4. The English decisions indicate that such was the law of the place where these payments were made, and that the passage money can be there recovered back. (*Mulloy* v. *Backer*, 5 East., 316; *Moffat* v. *East India Co.*, 10 id., 468; *Lewis* v. *Marshall*, 7 Mann & Grang., 729; *Coppin* v. *Braithwait*, 8 Lond. Jur., 875.)

5. The passage money received by the agents in Liverpool, being payable back by reason of the non-performance, (arising from the perils insured against,) the money (if not actually refunded) is held in trust for the parties entitled to it. The ship-owners would own the money, and be simply principals of those agents, if they performed the voyage or carried the passengers as contemplated. But if not, it was to be refunded. Then, the voyage having failed, the passengers not having been carried, the contract to carry being at an end, the money became a mere temporary deposit, belonging to the passengers or their representatives, and was in equity a trust fund; and this trust became enforceable at law in an action for money had and received for the use of the passengers. (2 Fonbl. Eq., book 2, ch. 1, § 1, note b.; 24 Wend. R., 514–518; 2 Denio, 142.)

6. There is no propriety in the underwriters refusing to settle until proof of the actual payment back of the fund thus deposited, and not earned, belonging to passengers and held in trust for them. They might as well refuse to pay for repairs or other losses, although incurred, and require proof that the ship owner had paid his debts occasioned by the necessity for prompt repairs or unusual expenditures, the risk of which was insured against. It is the chief object of insurance to place the ship owner promptly in funds. (*Wolfe* v. *The Howard Ins. Co.*, 1 Sandf. S. C. R., 124; *S. C.*, affirmed, 3 Seld. R., 583.)

7. An insurance on freight (to which passage money is analogous) has no reference to the collection of freight or to its payment, either in advance or after it is earned, but depends merely upon the ability of the vessel to earn it. Its design is to cover an amount at risk for all the current expenses, wear and tear, &c.,

to the extent of the probable receipts of a voyage independently of the mere value of a vessel as a chattel at the time of her loss; it is fixed on the amount of freight, (or passage money,) because that indicates a distinct limit and amount or valuation of an insurable interest. (*Ogden* v. *General Mut. Ins. Co.*, 215–217, &c.; 1 Phill. on Ins., 133, 134, &c.; Emerigon, 707, &c.; 3 Kent's Com., 7 ed., 337, 393.)

The judgment should be affirmed.

HOFFMAN, J. I find no mention, in the leading treatises upon the law of insurance, of a policy on passage money. Arnould, Phillips, Marshall and Park give no information upon the subject. The great work of Emerigon, the Commentaries of Pardessus, of Pothier, and of Boulay Paty, are equally silent. These oracles of the law, foreign or domestic, utter no response to the inquiries we address to them.

It is true that we may discover in the comprehensive language of some writers, authority to embrace such an insurance. "Everything may be insured, which by law, or by custom possessing the authority of law, is not forbidden." (*Kurike de Assecur*, *apud*, Boulay Paty, tom. 3, p. 356.)

The Commercial Code of France, (art. 334,) has undertaken to define what may be the objects of insurance. In article 347 it excludes various subjects; but it leaves as insurable, and not thus excepted, "everything capable of a valuation in money, and subject to the risks of navigation." (See also Pardessus, tom. 3, art. 758.)

We find, however, in some late cases in England, that policies upon passage money have come before the courts, under a statute of 15 and 16 Victoria, 1852, (ch. 44.)

In the first place I shall endeavor to elicit, out of the strange attempt to adapt an old cargo policy to an insurance on passage money, the material elements and stipulations of the contract.

The Company, on the 13th of January, 1855, agree with Mr. Ogden, on behalf of whom it may concern, that they will insure, on a voyage from Liverpool to New York, the sum of $6,395, passage money received by A. Taylor & Co., or their agents in Liverpool, for passengers on board the ship Driver, for a premium of $191.80. By a clause in the body of the policy, the risk

was not to attach until the passengers were engaged and paid for. By a subsequent clause this was modified, so that the risk was not to attach until the passengers were on board. The amount of the passage money was to be named to the Company as soon as ascertained. In case of the detention (of the vessel) by any of the perils insured against, whereby the passengers' fare or charges became a charge to the underwriters, it was to be estimated at not exceeding, for first cabin passengers $1 per day, for second cabin passengers 50 cents per day, and for third cabin passengers 30 cents per day. When new passengers were substituted for the first, the new earnings were to be deemed salvage to the original underwriters, allowance being made for additional fare as above.

The adventure was to begin from the loading of the goods, and to endure until they were safely landed.

The perils insured against are the usual perils enumerated in a marine policy, with the general clause of all other perils, losses and misfortunes that have or shall come to the hurt or damage of such goods and merchandise, or any part thereof.

The passage money was received in Liverpool on the 12th of February, 1856, and the vessel sailed on the 12th. The amount was named, pursuant to the policy, on the 19th of March, advices no doubt having been received of the passengers being shipped.

We have, then, in this contract, these elements: that the passage money actually received by Taylor & Co., was the subject insured; that the risk commenced when the passengers who paid it were received on board; and an engagement to indemnify the assured for any loss of that passage money, or any part of it, which should be occasioned by any of the perils enumerated and insured against.

Having received the passage money, the subject insured, it is for the plaintiff to establish that he has lost it, or part of it, before he can ask restitution through this agreement of indemnity.

A positive deduction is contemplated by the policy, when, by reason of a detention on the voyage, expenses have been incurred; and, generally speaking, the actual and absolute occurrence of loss or damage by destruction or injury of the thing insured, or payment of money from such damage, is to be shown before the indemnity can be demanded.

But it is not to be denied that if a liability is clearly fixed, if upon the facts the Court must say it exists, and if the condition of the policy plainly covers that liability as much as if it had been discharged, the amount may be recovered under an insurance. This is the rule declared in *Wolfe* v. *The Howard Insurance Co.* (1 Sandf. S. C. R., 124; *S. C.*, 3 Seld., 583.) The duties were judicially decided to be due, and the policy provided for the estimate of the goods at their actual cash value, at the time the loss should happen. Though the duties were unpaid, it was considered that they could be included in the recovery under the policy, as much as the value of goods insured could be recovered, although not paid for.

So in *Van Natta* v. *The Mutual Security Insurance Company*, (2 Sandf. S. C. R., 490,) upon demurrer to a declaration on a policy it was held, that the liability of a common carrier for goods destroyed by fire was an insurable interest; was covered by the general words in a policy, of its being for his account and benefit; and that an averment of a liability to pay to the owners a greater sum than that insured, was sufficient, without averring actual payment.

It may be noticed, that no allegation of such a liability is found in this complaint.

Our attention has very properly been called to the analogy of the rule as to payment of freight in advance. It is insisted that freight so paid may be recovered back, if the goods are not delivered. There can be no doubt of this being the rule under an ordinary bill of lading, for by its terms the contract is to deliver the goods, and the fulfillment of this is a condition precedent to the right to freight. (*Phelps* v. *Williamson*, 5 Sandf. S. C. R., 578; *Griggs* v. *Austin*, 3 Pick., 20.)

But of course a special agreement may control this rule, and a fair construction of special clauses may show that the parties had agreed that repayment should not necessarily follow the failure of the voyage. (Id.)

Chief Justice KENT, in *Watson* v. *Duykinck*, (3 John. R., 335,) traces the general rule in the foreign law, and notices the ordinance of the Marine and the Commentary of Valin to that effect, unless there be a special agreement varying it. The 302d article of the Code of Commerce has followed the ordinance in each

particular. Freight is not due for goods lost by tempests, &c., and it must be restored if advanced, unless there is a different agreement.

Accordingly, we find, that if freight is to be paid at all events, or if it has been paid with the clause that it shall not be repaid in case of shipwreck, (as is permitted by the 302d article of the Code of Commerce,) it may be made the subject of insurance, not by the captain or owner, who has gained it, and for whom it is no longer at risk, but by the freighter who runs the risk of losing it. (Boulay Paty, tom. 3, p. 484.) Valin, Pothier, and in substance Emerigon concur in this.

Hall v. *Janson*, (4 Ellis & Blackb., 500,) is in accordance with this rule, the case being precisely the converse one in its facts. The policy was "on money advanced" to the assured as owner of the ship, "on account of the freight of the cargo loaded on board her." It was substantially freight advanced. The ship owner must repay the amount if he failed to carry the goods, although prevented by the perils of navigation. He had therefore an insurable interest.

Yet we see that in *Mansfield* v. *Maitland*, (4 Barn. & Ald., 582,) the specialty of a charter party modified this rule. The freighters, it was held, had no insurable interest because the transaction on the bill of exchange was merely a loan to the owner of the ship, for which he had his action. But had it been expressed that the bill was in part payment of the freight, the loss of the ship would have produced a loss to the freighter of the money advanced, and he would have had an insurable interest.

Thus, in all these cases, the instruments containing the contract between the freighter and the ship owner were before the Court, and on them the Court concluded that a plain, legal liability to refund pre-paid freight existed, and when that is concluded, an insurable interest in the ship owner is found, and liability thus judicially demonstrated is held sufficient, and will be so without actual payment.

In *Phelps* v. *Williamson*, (*ut supra*,) the bill of lading was in proof, and was in the ordinary unconditional form to deliver the goods.

There are several American and English authorities which more directly bear upon the question of pre-paid passage money,

and in which the general doctrine is found, that such passage may be recovered back if the contract is not complied with. But in every case, what was the contract, was the very question to be determined. Upon the instruments and facts of each, the Court settles this question. When this is clearly settled and the liability is ascertained, it may, as before stated, be the ground of a recovery on a policy.

Thus, in the case of *Zenobia*, (1 Abb. Ad. R., 48, 80; see 86, 94,) the allegation was, that the master contracted to convey the libellant and his family to New York, and he paid $150 down, in part for the passage money. This allegation the Court says was proven.

In *Cope* v. *Dodd*, (1 Harr. Penn. R., 33,) the receipt given to the passenger was in evidence, and was considered as an engagement to transport to Liverpool. In *Brown* v. *Harris*, (2 Gray, 359,) the agreed statement of facts showed a contract by the defendant to transport the plaintiff as a passenger, in the defendant's ship, from San Francisco to Panama, for the sum of $50, paid in advance. It showed a failure to perform, in consequence of the wreck of the ship, and that the passenger was landed at a place less than half way to the port of destination, and that no offer was made to forward him.

In *Howland* v. *The Brig Lavinia*, (1 Pet. Ad. R., 121,) the learned judge says, that the same rules are to be applied to passage money as are established on the subject of freight. No passage money is due until the vessel arrives at her port of destination, unless otherwise agreed upon. If the passage money has been paid beforehand, it ought to be refunded. So freight on goods is not payable until delivery at the port for which they are shipped.

So in what are termed the Vanderbilt cases, the contracts were in proof and with parol evidence which was competent, were construed to mean engagements to convey the passengers through to San Francisco. (See 19 Barb., 222; 21 id., 26; and 17 N. Y. R., 306.) In some of these cases the Court below confined the right of recovery to the passage money paid, upon the facts proven. The Court of Appeals sustained a verdict, for expenses beyond this.

In *Watson* v. *Duykinck*, (3 John. R., 335,) the paper given by the sloop owner was, "that in consideration of $100, to be paid

immediately, he would suffer the plaintiff to proceed in the sloop as a passenger on the voyage, and to load on board for transportation merchandise to the value of $600." The money was paid. The vessel was wrecked on her voyage, and the action was to recover back the money. A usage in New York not to refund passage money, if the voyage is begun, was found by a special verdict. The Court decided, however, upon the contract itself, that the action would not lie.

The following English cases will show how entirely dependent upon the particular provisions and terms of the contract between the parties, or upon established usage, is the question of a responsibility to refund passage money paid in advance. (*Moffat* v. *The East India Eng. Co.*, 10 East., 468; *Gillan* v. *Simpkin*, 4 Camp., 241; *Yates* v. *Duff*, 3 Car. & Payne, 369; *Saunders* v *Drew*, 3 Barn. & Adol., 445; *De Silvale* v. *Kendall*, 4 Maul. & Selw., 37.)

I deduce from my examination of the authorities, that when indemnity is sought under a policy, for the loss of the subject insured, not absolutely incurred or actually borne, but contingent and resting upon a liability which will give it practical effect; that liability must be shown to be inevitable, as the necessary result of the law upon the agreement of the parties and the facts of the case. The question of liability in the present instance will be, in all probability, controlled by the receipt given to the passengers by the agents in Liverpool. That receipt, or any other contract between the parties there made would show whether, under any of the authorities cited, the money was to be refunded under the circumstances which have here occurred. It is to be observed, also, that the complaint does not even aver that the contract was to transport the passengers to New York; only that the vessel was bound to New York, and had on board 344 passengers. I apprehend there would be little difficulty in showing the form and nature of the receipts or agreements which were given; although, of course, they were delivered to the passengers.

Thus the plaintiff has, neither by means of the contracts, by means of any other evidence, nor even by his own allegation, shown or asserted an engagement for the absolute conveyance of the passengers from Liverpool to New York, nor his unconditional responsibility to refund this passage money, if the passen-

gers were not carried there, and I think the duty to do this, before he can call upon the underwriters rested with him. I think that he has not done it even upon his complaint, and certainly not upon his evidence. His liability is at this moment not merely contingent in point of fact, but wholly uncertain and undetermined in point of law.

The judgment should be reversed and a new trial granted, with costs to abide the event.

MONCRIEF, J., concurred in the conclusion, that the judgment should be reversed; PIERREPONT, J., dissented.

Judgment reversed, and a new trial granted.

OLYPHANT & SON, Plaintiffs and Appellants, *v.* G. W. ATWOOD, Defendant and Respondent.

1. Where the drawee of a bill, at the time it was drawn and accepted, though a citizen of the United States, resided in England, and continued to reside there until after its maturity, and while so continuing to reside there became bankrupt after the maturity of such bill, and thereupon applied for and obtained his discharge, under the bankrupt laws of that country, from all debts due by him when he became bankrupt, it was held, that his liability as such acceptor was thereby discharged, notwithstanding such bill, when it was accepted, was owned by a citizen and resident of the United States, and thence continued to be so owned, until after such discharge was obtained.

(Before SLOSSON, WOODRUFF and PIERREPONT, J. J.)

Heard, October 6th, 1858; decided, April 9th, 1859.

THIS is an appeal by the plaintiffs, (surviving members of the firm of Olyphant & Son,) from a judgment in favor of the defendant, rendered upon a demurrer to the defendant's answer.

The complaint is upon a bill of exchange, dated New York, August 12th, 1847, and drawn there by Edward J. Mann on the defendant, George W. Atwood, for £1,500, payable sixty days after sight, to the drawer's own order. The bill names no place

of payment, and is directed "to George W. Atwood, 14 America Square, London."

The bill was indorsed and delivered by the drawer, in New York, to Olyphant & Co., (the plaintiffs,) who then were and since have been citizens of the United States, resident in New York.

The defendant, when the bill was drawn and was accepted by him, was a citizen of the United States, but resided in England, in the kingdom of Great Britain, and continued to reside there until after he obtained a discharge from all his debts under the bankrupt laws of that country, on the 23d of August, 1848. The defendant's acceptance of the bill is in these words, viz.:

"August 30, 1847.

"Accepted, payable at Messrs. Glynn & Co's.

"GEO. W. ATWOOD."

The plaintiffs demurred to the defendant's answer, and the demurrer, presented the question whether such bankrupt discharge, it having been obtained according to the laws of England, and being by such laws a discharge "from all debts due by him when he became bankrupt," was a bar to an action by these plaintiffs against the defendant, as such acceptor. The defendant became a bankrupt in April, 1848. Chief Justice OAKLEY, before whom the demurrer was argued at Special Term, gave judgment for the defendant, and from that judgment the present appeal is taken.

Clarence A. Seward, for appellants (the plaintiffs),

Contended that the bankrupt laws of England have no extraterritorial force, and cannot here operate to discharge a citizen of this State or of Great Britain from his indebtedness to a citizen, and resident of this State, and cited, *inter alia.* (*Baker* v. *Wheaton*, 5 Mass., 509; *Ogden* v. *Saunders*, 12 Wheat., 213; *Boyle* v. *Zacharie*, 6 Peters, 348; *Holmes* v. *Remsen*, 20 J. R., 229; *Braynard* v. *Marshall*, 8 Pick., 194; *Springer* v. *Foster*, 2 Story, 383; *Savoye* v. *Marsh*, 10 Metc., 594; *Fiske* v. *Foster*, id., 597; *Cook* v. *Moffatt*, 5 How., (U. S.,) 295; *Donnelly* v. *Corbett*, 3 Seld., 500; 3 Story's Com. on Const., 256; *Prentiss* v. *Savage*, 13 Mass., 20;

Tappan v. *Poor*, 15 id., 490; *Harrison* v. *Sterry*, 5 Cranch, 289; *Abraham* v. *Plestoro*, 3 Wend., 538; *Johnson* v. *Hunt*, 23 id., 87; *Hoyt* v. *Thompson*, 1 Seld., 352.)

A. P. Mann, for respondent (the defendant),

Insisted, that the construction, effect and obligation of a contract, are to be determined by the law of the place where the contract was made and to be performed. That the contract of this defendant was made and was to be performed in England. That a discharge which is valid by the law of the place where the contract was made, is valid everywhere. (He cited Story's Conf. L., §§ 331–335; Kent's Com., 459, 3d ed.; *Potter* v. *Brown*, 5 East., 124; *May et al.* v. *Breed*, 7 Cush., 15; *Vezy* v. *McHenry*, 29 Me. R., 212; *Mather* v. *Bush*, 16 J. R., 233; *Sherrill* v. *Hopkins*, 1 Cow. R., 103, 107; *Mather* v. *Bush*, 16 John., 233; *Blanchard* v. *Russell*, 13 Mass., 16, &c.; *Burrows* v. *Jemims*, 2 Strange, 633; 2 Bell's Com., 689, and also several of the cases relied on by the appellants.)

Slosson, J. The question is, whether a discharge, under the English bankrupt law, of a debt contracted and payable in England, and by a person residing there, due to a citizen of this State, can be pleaded in bar to an action upon it in the Courts of this State.

The effect of an assignment under the English bankrupt laws, as operating a transfer of the debts, moneys and property due to or belonging to the bankrupt situated in this country, has been the subject of frequent discussion; and it may now be considered as settled in this State, if not in most of the other States of the Union, that while, by comity, the assignees in bankruptcy are allowed to sue in our Courts in order to recover claims or property due or belonging to the bankrupt within our own territory, they do not acquire, by the assignment itself, a lien on such debts or property so as to entitle them to a priority over a resident creditor who has attached the same subsequently to such assignment, and before the assignee has asserted his claim to the property by a resort to legal process in our own Courts.

As respects property of the bankrupt found within our own jurisdiction, the law gives the preference to resident creditors, if

they first assert their title. The assignees are considered as standing in the shoes of the bankrupt, having no better rights and subject to the equities to which he is subject; and when permitted to sue here, they do so as representatives of the bankrupt, and not as assignees having an absolute right as against all the world, and they are subject to our laws in respect to the remedy. The assignment in bankruptcy, being statutory, or by virtue of an act of the Legislature, and not voluntary, has no extra-territorial operation, at least in passing the title to the bankrupt's property beyond the country where the law was passed. It may entitle the assignee to sue here, but, as I have already said, it is by comity only, and the assignee, when he comes here, has no better title to the property located here than the bankrupt had; so that, if a creditor of the bankrupt has already attached the property, the foreign assignee is remediless. If no such attachment has intervened, there is no difficulty in the assignee acquiring, by such remedies as the law prescribes, a lien which shall be paramount to any which a resident creditor can afterwards acquire. The State regulates the subject of property found within its limits; and while, by courtesy, it permits foreign assignees in bankruptcy to sue here, it will not give them, by virtue of a mere statutory assignment which can have no extra-territorial operation, a preference in respect to such property over the claims, first asserted, of our own resident citizens. This is not repudiating or denying any efficacy to the foreign law: it is merely limiting the boundaries of that comity by which the assignees under the law are permitted to act in our Courts in asserting their claims by virtue of it to property of the bankrupt found within the jurisdiction of the Court. It places the assignees on an equal footing with the resident creditors of the bankrupt, and then gives to the one who acquires the first lien, by attachment or other process under our laws, the priority. It is merely asserting that, by virtue of the assignment itself, the foreign assignee does not acquire a priority of title to property of the bankrupt within our territory over a domestic creditor who has, by due process of our own laws, acquired a lien upon it, before the assignee has asserted his claim in our Courts. The law, which thus permits the domestic creditor to acquire a lien on the personal property of, or debts due, the bankrupt within our own limits, over the title created by

the assignment in bankruptcy, creates, it is true, an exception to, or limitation of the rule which is true in general, to wit, that personal property, as to its transmission and disposition, is governed by the law of the domicil of the owner; but it is an exception created by our own law as against a foreign law which we are not bound to recognize, and in favor of our own citizens and for their special protection. (Story's Conf. Laws, §§ 410, 412; *Holmes* v. *Remsen*, 20 J. R., 229.)

The case of *Holmes* v. *Remsen* was fully recognized and sanctioned by the Court of Appeals in *Hoyt* v. *Thompson*, (1 Seld., 340, 341,) and the case of *Abraham* v. *Plestoro*, (3 Wend., 358,) was held not to have authoritatively established a different doctrine.

It will thus be seen, that under the limitation of a preference in favor of the domestic creditor who first attaches the bankrupt's property within our own jurisdiction, the foreign law is recognized in our courts, and the question which we are called to pass upon by this demurrer, is, how far we shall recognize a discharge of the debt itself under a foreign bankrupt law, when sued upon in this State.

The decision of this question is in no wise affected by the exceptional rule in favor of the domestic creditor above stated, nor is an argument against our recognition of the validity of such discharge, to be drawn from the discrimination thus made in favor of our own creditors. It depends upon the application of the rule, admitted to be of universal force where the common law prevails, that the law of the place of the contract where it is made and to be performed, is the law of the contract itself. Much ingenuity has been expended in discussing the theory of this rule, in cases where the place of the contract is different from that of the forum in which the action is brought, some founding the rule upon the idea of an implied assent to be bound by it, as a part of the contract, on the part of all the parties to it, and others holding that the law binds by its own force, without the aid of an assent of the parties express or implied. Those who maintain the first of these views, admit that, for all purposes of giving construction and operation to the contract, the parties may well be assumed to have assented to the laws which prevail in respect to it where the contract was made, but that it is absurd

to suppose that the parties could have assented to the operation of a law which should, against their will, dissolve the contract itself, and of this opinion was the Court of Appeals in *Donnelly* v. *Corbett.* (3 Seld., 506.) It is, in my judgment, unnecessary to resort to any such presumption of assent on the part of the creditor to be bound by a law which discharges the contract. The true rule is, that the law of the place of the contract absolutely governs it, *proprio vigore*, in all respects; it not only gives it life and determines the extent of its obligation, but prescribes the mode of its execution and how it may, and in certain contingencies shall, be satisfied. The principle is well expressed by Chief Justice PARKER, in *Blanchard* v. *Russel*, (13 Mass., 4,) and quoted and adopted by Chief Justice SHAW, in *May* v. *Breed*. (7 Cush., 36.) "We think," he says, "it may be assumed as a rule affecting all personal contracts, that they are subject to all the consequences attached to contracts of a similar nature by the laws of the country where they are made, if the contracting party is a subject of or resident in that country where it is entered into and no provision is introduced to refer it to the laws of any other country."

Chief Justice SHAW, in the case last cited, thus expresses it: "The principle is this, that the law of the place of the contract, which may be called the law of the contract, gives it its character, makes it what it is, fixes its limits and obligation, fixing the time when it shall commence, how it shall be executed or satisfied, and how it shall be terminated and discharged; when, therefore, such a contract is discharged by force of the same law which gave it its origin and effect, it is extinguished, and no longer exists as a contract," and he adds: "The law under which such discharge is obtained can hardly be said (when invoked as a defense in a suit upon the contract in another country) to have an extra-territorial operation; it operates within the country where the contract was made in fixing its character and legal effect, which, upon the happening of the contemplated contingency, put an end alike to its obligation and to its execution."

I can add nothing to the force or precision of this exposition of the principle of the rule in question. It was enunciated in a case identical in every essential particular with the present one, and the foreign discharge was held to be a perfect bar.

The same principle is recognized and adopted in England, in its application to a discharge obtained in this country, Lord ELLENBOROUGH distinctly asserting that, "What is a discharge of a debt in the country where it was contracted, is a discharge of it everywhere." (*Potter* v. *Brown*, 5 East., 124.)

It was also recognized and adopted in this State, in the case of *Hicks* v. *Brown*, (12 J. R., 142,) in which a discharge, under the insolvent laws of Louisiana, of a drawer of a bill of exchange residing in New Orleans, and who drew the bill there in favor of the plaintiff, a citizen of another State, upon a party also a citizen of another State, and which bill was protested for non-acceptance, was held, in a suit upon the bill in this State, to be a perfect bar, on the principle of the *lex loci*.

No reference appears to have been made in this case, to the prohibition against the passage of laws by the several States impairing the obligation of contracts, as affecting the question.

In *Sherrill* v. *Hopkins*, (1 Cow., 103,) the Supreme Court of this State fully recognized, adopted and enforced the same rule, holding an insolvent's discharge, under the laws of this State, to be a perfect defense, the contract having been made here, notwithstanding the plaintiff, the creditor, was not at the time of making of said contract, a citizen of this State. "The rule upon this subject," said Justice SUTHERLAND, "is, that the law of the place where the contract is made is to control it, unless it appear upon the face of the contract that it was to be performed at some other place, or was made with reference to the laws of some other place, and the reason of the rule is, not the allegiance due from the contracting parties to the government where the contract is made or is to be executed, but the supposed reference which every contract has to the laws of the State or country where it is made or is to be executed, whether the parties are citizens of that State or country or not."

The elementary writers expressly affirm the same rule, and hold that the discharge of the debtor under the bankrupt laws of the country where the contract was made, is a good discharge in every other country, and pleadable in bar. (2 Kent's Com., 7th ed., p. 574, marg. 459; Story's Conf. Laws, § 335.)

The case of *Donnelly* v. *Corbett*, (3 Seld., 500,) does not conflict with this rule; for, in that case, the original contract was made

in New York, and that was held to be the place of the contract, though the maker lived in South Carolina, and the note was payable there. A discharge under the insolvent laws of the latter State could not, therefore, be said to be in pursuance of a law of the place of contract. Besides, that case was decided, in part, at least, upon the principle that, as respects the plaintiff, a citizen of New York, the insolvent laws of another State discharging the obligation of the contract were invalid under the Constitution of the United States. Unless the case of *Donnelly* v. *Corbett* is to be considered as establishing the doctrine that the Courts of this State are to treat as wholly inoperative all extra-territorial bankrupt or insolvent laws as against creditors residing in the State and suing here, I can see no reason in that decision for holding that we are not to give to the bankrupt laws of England, as operating upon the contract itself, all the force and effect which any other law of the place of the contract, and applicable to it, would have. Notwithstanding some observations of the Court in announcing its decision in that case, I do not understand it to go to any such length. It was unnecessary to the decision that it should go that length. It was a case arising under our own laws and the Constitution of the United States. Cases arising between citizens of different States, on contracts made within the United States, and in which the validity of insolvent laws, operating on the contract, depends on the application of the constitutional prohibition before referred to, are not in *pari materia* with cases arising under the English bankrupt laws; and no argument can be drawn from the doctrine which must control such cases, against the binding force and effect of a discharge under the latter laws. (Story's Conf. Laws, § 341.)

Upon both authority and principle, I hold that the contract now in question was affected by the bankrupt laws in force in England at the time it was made, as much as by any law of that country regulating its force or giving it construction, or determining the mode or time of its payment; notwithstanding these laws do, in certain contingencies, and on certain conditions, put a final end to the contract itself. The discharge in this case is a perfect bar to the action.

WOODRUFF, J., concurred.

PIERREPONT, J. (Dissenting.) This case presents but a single question. The intimate commercial relations existing between England and this country make that question one of much practical importance. The question is whether a citizen of New York residing in England, who accepts a bill of exchange payable there, drawn upon him by a merchant of New York, and after such acceptance obtains a discharge in English bankruptcy, of which the holder of the bill had no notice, can, on his return to New York, plead such discharge in bar of a suit brought by the New York holder of the bill.

Four years after the United States had achieved their independence, Lord Thurlow was told that in America the interest of the assignees, under the English bankrupt law was not regarded, and he observed with surprise that "he had no idea of any country refusing to take notice of the rights of the assignees under their laws, and he believed every country on earth would do it besides." (*Ex parte Blake*, 1 Cox, 398.)

Lord HARDWICK, (in *Pipon* v. *Pipon*, Amb. R., 25; *Thomas* v. *Watkins*, 2 Ves., 35;) Lord MANSFIELD, (in *Balentine* v. *Golding*, 1 Cook's Bankrupt Laws, 487; *Wadham* v. *Marlow*, 1 H. Bl., 437, note; 8 East., 314;) Lord CAMDEN, (in *Jollet* v. *Deponthieu*, 1 H. Bl., 132, note;) Lord KENYON, (in *Hunter* v. *Potts*, 4 Term. R., 182;) Lord Ch. CLIFFORD, (in *Neal* v. *Cottingham*, 1 H. Bl., 132, note;) Lord THURLOW, (in *Ex parte Blake*, 1 Cox, 398;) Lord LOUGHBOROUGH, (in *Sill* v. *Worswick*, 1 H. Bl., 665–691;) Lord ELLENBOROUGH, (in 5 East., 131;) and Lord ELDON, (in *Selkrig* v. *Davis*, 2 Dow., 230; 2 Rose, 292, in House of Lords, A. D. 1814;) all held that, as regards personal property, the *lex domicilii*, is to govern, and not the *lex rei sitae;* while each of them virtually, and some of them explicitly decided that an assignment in bankruptcy must be considered a voluntary assignment, and for valuable consideration, and that it conveyed the personal property to the assignees absolutely, and as against attaching creditors in foreign countries. And in the case of *Sill* v. *Worswick*, Lord LOUGHBOROUGH observed, that it was a clear proposition, not only of the law of England but of every country in the world where law had the semblance of science, that personal property had no locality and was subject to the law which governs the person, both with respect to the disposition of it and to

the transmission of it, either by succession or the act of the party.

Following these high authorities, Chancellor KENT held, (in *Holmes* v. *Remsen*, 4 J. Ch. R., 460,) that a debtor in England owing a house in New York, as well as creditors in England, being declared a bankrupt in England, and his estate being duly assigned, that the English assignees took the bankrupt's property wherever situated, and that the attaching creditor in New York acquired no rights in the bankrupt's personal estate seized in New York subsequent to the bankruptcy. But this opinion of the Chancellor was soon after questioned in a suit at law between the same parties, (20 Johns. R., 254;) and within a few years after it became and has continued to be the settled law of this country that the *lex loci rei sitæ* prevails over the *lex domicilii* with regard to the rule of preferences in case of insolvents' estates; and that the laws of other governments have no force beyond their own territorial limits, and can have no operation in other states except upon a principle of comity; and that no prior assignment in bankruptcy, under a foreign law, will be permitted to prevail against a subsequent attachment, by an American creditor, of the bankrupt's effects found here. (*Greenwood* v. *Curtis*, 6 Mass. R., 378; *Oliver* v. *Townes*, 14 Martin's R., 99; *Milne* v. *Moreton*, 6 Binney's R., 353; *Ingraham* v. *Geyer*, 13 Mass. R., 146; *Ogden* v. *Saunders*, 12 Wheat., 213; *Abraham* v. *Plestoro*, 3 Wend. R., 538; *Hoyt* v. *Thompson*, 1 Seld., 340.)

It has long been settled that a discharge under a State law is no bar to a suit on a contract existing when the law was passed, nor to an action by a citizen of another State in the Courts of the United States, or of any other State than that where the discharge was obtained. The discharge under a State law will not discharge a debt due to a citizen of another State. (*Sturges* v. *Crowninshield*, 4 Wheat., 122; *Ogden* v. *Saunders*, 12 Wheat., 213; *Cook* v. *Moffat*, 5 How. U. S., 295; *Braynard* v. *Marshall*, 8 Pick., 194; *Baker* v. *Wheaton*, 5 Mass., 509; *Savoye* v. *Marsh*, 10 Metc., 594; *Hoyt* v. *Thompson*, 1 Seld., 340; *Donnelly* v. *Corbett*, 3 id., 500.)

In the case of *Donnelly* v. *Corbett*, reported in the 3d of Selden, Corbett, a resident of South Carolina, purchased goods of Donnelly in New York, and gave his note at eight months, payable at the Bank of South Carolina, in Charleston. The notes being

dishonored, the plaintiff brought suit in the Court of South Carolina and recovered judgment. Subsequently Corbett obtained a discharge from his debts under the insolvent laws of South Carolina.

The plaintiff afterwards commenced suit upon the judgment, in the Supreme Court of this State, and the defendant pleaded his discharge; the Court of Appeals held that the discharge was no bar to the action, although the debtor had been discharged under the laws of South Carolina where he had always resided; the very place designated in the contract for its performance, and although the insolvent laws under which the discharge was obtained were in full force at, and long prior to, the date of the contract.

The precise question now before us was decided in 1851, by Chief Justice SHAW, of the Supreme Court of Massachusetts, in the case of *May* v. *Breed*, (7 Cush., 15,) giving full effect to the English discharge against a Massachusetts creditor. The well considered opinion of this very able and eminent Judge demands a careful and most respectful consideration.

The learned Judge adopting the language of another, says:

"Thus if an American merchant becomes the creditor of an English merchant in England, and the English merchant becomes bankrupt and obtains a certificate of discharge, the American merchant will be concluded by such certificate, for it is reasonable to suppose that both parties knew of the existence of the bankrupt laws of England, and the contract must be presumed to have been made with reference to those laws."

The learned Judge (at p. 37) further says: "The ground upon which the principle is placed, is this, that the law of the place of the contract, which may be called the law of the contract, gives it its character, makes it what it is, fixes its limits and obligations, fixes the time when it shall commence, how it shall be executed or satisfied, and how it shall be terminated and discharged; when, therefore, such contract is discharged by force of the same law which gave it its origin and effect, it is extinguished and no longer exists as a contract."

This reasoning, though sound in general, seems not strictly applicable to the particular case under discussion.

The obligation of the English trader to pay the New York merchant his just debt, which, by accepting the draft, he pro-

mises to pay, does not rest upon English statutes. Its origin is ancient as commerce, and existed long before the passage of the English bankrupt act. It is not, therefore, "*sought to be discharged by force of the same law which gave it its origin and effect.*"

The theory seems to be, that a discharge in bankruptcy derives some part of its efficacy, at least, from the contract of the parties.

An absolute discharge from an honest debt, without the creditor's assent, is an act of high sovereignty, which overrides all contract, and proceeds against the creditor purely *in invitum*. The idea that it rests in any manner upon contract, in the language of Judge GARDINER, "scarcely deserves the credit of plausibility." (*Donnelly* v. *Corbett*, 3 Seld., 500.)

There is no doubt that acceptances are deemed contracts in the country where they are made, and the payments are regulated by the laws thereof. But, in my judgment, the bankrupt acts of England in no possible manner enter into the contract of acceptance of a foreign bill of exchange. Those laws have nothing whatever to do with the "*validity, nature, obligations or interpretation of such contract.*" The acceptance may justly be considered as made with reference to the English law relating to bills of exchange; and, if the acceptance is invalid or void under the English law, it cannot be enforced here. But the original invalidity of the contract is a widely different thing from a discharge, (by mere force of a local statute,) of a just and valid obligation.

In the language of Chief Justice PARKER, "We must look beyond the law regulating the interpretation of a contract to find the grounds upon which it may be discharged." (*Blanchard* v. *Russell*, 13 Mass., 1.)

We are to consider what effect is to be given to this act of foreign sovereignty, by which one of our own citizens is to be deprived of a debt admitted to be justly due.

Upon the principle of comity alone, we are asked to give full force to the discharge which is pleaded.

We have already seen that if the present defendant were a citizen of New Jersey, pleading a like discharge under the laws of that State, his defense would be of no validity. It is urged, however, that the Constitution of the United States interposes to deprive the citizen of New Jersey of such defense, while that instrument cannot operate to restrain the Parliament of Great

Britain from passing such bankrupt laws as they please; and that, by the comity of nations, our Courts must give full effect to the English bankrupt act, while they disregard similar laws of all the sister States; that though the framers of the Constitution of the American Union regarded such laws as so unjust that they forbid their passage by the different States, yet comity requires that our Courts shall give full force to this foreign discharge, which, if obtained under the laws of New Jersey, would be totally disregarded. That is to say, the same defense, (which, if interposed by a merchant of Hoboken, we must reject,) is to operate with full power when pleaded by a trader of Venice or Vienna.

This leads us to a consideration of what this comity is, which is invoked for such high ends, and to which Chief Justice SHAW, in the case above cited, gives all the efficacy which the defendant here claims.

It seems to reach something beyond the "golden rule," and requires us, out of courtesy, to respect those foreign laws as sacred, which, if made in our own confederacy, we deem to be unjust. It claims to shield the citizen who has become a bankrupt trader in London from the payment of his just debts, while it refuses any such protection to the same citizen when he has become a bankrupt trader in Charleston.

The learned Lord Chancellors, above cited, in alluding to the rights of assignees in bankruptcy, speak like Englishmen full of reverence for English laws; but whenever a debtor in England invokes the foreign law to relieve him from his debt, these same Judges invariably discriminate, and respect or disregard the foreign law according as they deem such law equitable or unjust; and although they assert that full force is given to an assignment in English bankruptcy, "wherever justice prevails or law has the semblance of science," yet Lord ELLENBOROUGH, in the case of *Potter* v. *Brown*, (5 East., 124,) cited by the defendant here, laid it down as a doctrine long settled, and, as he expresses it, "laid up among the acknowledged rules of jurisprudence," that when foreign laws clash with the rights of British subjects, the foreign laws are to yield.

The recognition of foreign statute laws at all has never had any other basis than that of mere comity; and whether the cour-

tesy should be extended or not, has uniformly, in England, been left to the discretion of the Judges as the cases arose.

One case, among many, will suffice to illustrate the English rule upon this subject.

A Dane, named Wolff, became a trader in England, and was finally naturalized. Oxholm, a subject of the King of Denmark, residing in Copenhagen, became indebted to Wolff in upwards of £2,100, to recover which, a suit was commenced in the Courts of Denmark against Oxholm. Pending the action, a war broke out between England and Denmark; and in September, 1807, the Danish government passed a law requiring all persons to render an account of all debts due English subjects, directing the same to be paid into the treasury of Denmark, and provided that in case any one concealed the debt, he should be proceeded against by the officers of the Exchequer.

As the case was in Court, there could be no concealment, and Oxholm was compelled to pay the debt, and did actually pay it into the treasury of Denmark in 1812. In 1814 Oxholm came to England, and was there arrested by the assignees of Wolff for this very debt. He pleaded compulsory payment under the laws of his own country. The cause was decided by Lord ELLENBOROUGH in 1818, and Oxholm was obliged to pay the money over again, which he had long before been compelled to pay by force of the laws of Denmark. (*Wolff* v. *Oxholm*, 6 Maul. & Selw., 92.)

Lord ELLENBOROUGH suggests a doubt whether the law of Denmark was not in conflict with the law of nations. That the Danish law was in conformity with international law will be found as early as Vattel, (Vattel, lib. 2, ch. 18, §§ 342, 343, 344;) and as late as the case of *Brown* v. *The United States*, reported in the 8th of Cranch. (8 Cranch, 110.)

The defendant has cited two cases, one from the Maine Reports and the other from East's Reports, which he claims are analogous. Examination will show them to be different. In the case of *Very* v. *McHenry*, (29 Maine, 212,) the plaintiff went to New Brunswick, and there performed labor, which was the foundation of the claim. The defendant was discharged in New Brunswick, and the Court in Maine gave effect to the discharge.

In *Potter* v. *Brown*, (5 East., 129,) a merchant in Baltimore drew a bill upon another in England. The bill was protested for non-acceptance; the drawer was discharged under the American bankrupt act of 1799, and the discharge was held to be a bar in England.

In deciding that case, Lord ELLENBOROUGH very justly observed: "We always import, together with their persons, the existing relations of foreigners, as between themselves, according to the laws of their own countries; *except, indeed, where those laws clash with the rights of our own subjects here.*" This, in my judgment, expresses the true doctrine, and will be found in conformity with the settled law both of England and America.

We recognize the rights of foreign assignees under a voluntary assignment; though the Courts of New Jersey seem to have denied even that.

But we do not regard any statutory assignment as voluntary.

By comity, we permit English assignees in bankruptcy, and trustees under insolvent laws of the several States, to prosecute claims in our Courts, and to recover the property of the foreign insolvent, except where the rights of our own citizens are brought in competition, in which case the foreign claimant, under foreign laws, must yield. (*Prentis* v. *Savage*, 13 Mass., 20; Story's Conf. Laws, § 348; *Bank of Augusta* v. *Earle*, 13 Peters, 520; *Hoyt* v. *Thompson*, 1 Seld., 340; *Bard* v. *Poole*, 2 Kern., 505; *Penniman* v. *Meigs*, 9 J. R., 325; *Abraham* v. *Plestoro*, 3 Wend., 539; *Holmes* v. *Remsen*, 20 J. R., 265.)

Let us see whether the relations between a drawer and holder of a bill in New York and the acceptor in London are altogether foreign, so that, when the acceptor comes to New York, we can be said to have "*imported*, together with the person, *all* the existing relations."

When a merchant in New York draws upon his banker in London, the theory is that the banker has the funds of the drawer; and when the banker accepts the draft, he admits that he has such funds.

A Liverpool merchant, through his agent here, purchases a thousand barrels of flour in New York, and ships it to England; nothing is said about the time of payment; the seller draws upon the buyer at three days' sight; the bill is accepted, payable in London.

An English traveler in America borrows a thousand dollars of his friend in New York, and gives no voucher. On his return to England, the friend in New York draws upon the returned traveler, who accepts the bill, payable in Liverpool. In each case, the acceptor is in England, and the contract of acceptance is made in England; but the debt arose in America. The obligation existed before the acceptance; and in every case, (the contrary not appearing,) the acceptor admits that he owed to the drawer the amount of the bill accepted.

In the cases put, the original debt was contracted in America, and not in England; and in no case of acceptance of a foreign bill are we compelled to assume, without evidence, that the obligation which moved the acceptance originated in the country of the acceptor.

In these supposed cases, one of flour purchased and the other of money borrowed in America by a British subject, the acceptances go to protest, the debtor obtains a discharge in English bankruptcy, and returns to New York; and, in bar of suit brought, pleads such discharge. Are we called upon, by the comity of nations, to allow his plea? Are all the relations of debtor and creditor existing between the Englishman and the American, foreign? And have we "*imported* all those relations?" It is quite certain that the original obligation was not foreign and not imported; and (in judgment of law) there being no evidence to the contrary, an acceptor of a foreign bill admits, by his acceptance, an existing obligation due to the drawer.

I, at least, cannot assent to extend a higher courtesy towards the statutes of Austria or England than towards the laws of our sister States; and I am persuaded, after no little investigation, that the settled law of England, (notwithstanding some *dicta* of her Chancellors,) is now, and has long been, in harmony with these views.

I think the order overruling the demurrer should be reversed, with leave to the defendant to answer over in twenty days, upon payment of costs of the demurrer and of this appeal.

Judgment affirmed.[1]

[1] See Robinson's Practice, vol. 1, p. 89, ch. xviii, Title, "Effect of discharge under insolvent or bankrupt law." See, also, *Smith* v. *Gardner*, *ante*, p. 54.

WM. J. FORBES, Plaintiff and Respondent, v. EDGAR LOGAN, Receiver, impleaded with Robert and Thomas Waller, Defendant and Appellant.

1. A creditor's suit, by a judgment creditor having an execution thereon returned unsatisfied, to set aside an assignment as fraudulent, and reach the property assigned, can be maintained, notwithstanding the summons and complaint in it, and an injunction granted thereon, were served on the sixtieth day after the receipt by the Sheriff of such execution to be executed, and the execution was actually returned by the request of the plaintiff's attorney on the seventh day after its receipt by the Sheriff, and the complaint was verified and such injunction was granted on that alone, on the fifty-fourth day after such execution was so received. (Per HOFFMAN and MONCRIEF, J. J.)
2. *Held*, (by BOSWORTH, Ch. J., dissenting,) that such an action cannot be brought until after the return day of the execution has passed; that such was the settled rule before the Code, and that the Code has not abrogated it; and that especially should it be enforced when the action is commenced before the return day, upon a return procured to be made, within seven days after the execution was issued, by the written request of the attorney issuing it.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, January 7; decided, April 9, 1859.

THIS is an appeal from a judgment setting aside an assignment executed by Robert Waller to Thomas Waller, November 28, 1855, as being fraudulent and void, as against the creditors of the assignor. The appeal is taken on behalf of Logan, the receiver, who was made a defendant by the supplemental complaint. Logan had, on the 28th of November, 1856, been appointed Receiver of the assigned property, in a suit brought by other creditors of the assignor to procure the removal of the assignee, and the appointment of a Receiver in his place and stead, to execute the said assignment, and dispose of said property according to its provisions. The original action of the plaintiff, Forbes, was brought by him as a judgment creditor of the assignor, after execution had been issued thereon and returned unsatisfied in the manner hereafter stated. Subsequently the Receiver, Logan, was directed to be made a party by supplemental complaint, and this being done, he put in an answer to the original and supplemental com-

plaint. The cause being at issue as to all the parties, was tried at Special Term before Mr. Justice SLOSSON, without a jury, in January, 1858, who directed a judgment to be entered in favor of the plaintiff, from which the present appeal is taken.

In relation to the judgment and execution of the plaintiff against the assignor, the Judge found as follows:

"That the plaintiff recovered against the said Robert Waller the judgment stated in the complaint, for the amount, and at the time therein alleged, which was duly docketed, as stated in said complaint, and which judgment was recovered upon an indebtedness existing at the time of the execution of said assignment." (The complaint alleged the recovery, on the 2d of June, 1856, of a judgment in the Supreme Court, in favor of the plaintiff, against Robert Waller, for $5,764.47.) "That execution was issued upon said judgment on the 2d June, 1856, to the Sheriff of the city and county of New York, which execution was returned by said Sheriff, with the return of 'no property' indorsed, on the ninth of June, 1856, and that the same was so returned by the request of the plaintiff, by his attorney, in writing, which written request is set forth in the Case; that the plaintiff's attorney applied at the Sheriff's office, to Mr. Ludlow, the assistant of Deputy Sheriff Wilson, in whose hands the said execution was, to return the execution, and that said Ludlow informed said attorney that he and said Wilson had investigated and ascertained there was no property of the defendant on which they would levy without the Sheriff being indemnified. That said Ludlow had not gone personally to the store in Cedar street, (the assignor's place of business,) or to any other place, to levy on goods, nor had any Sheriff's jury been called to try the title to any property. That no levy was made under said execution on any property, and that personal property not exempt from execution, and purporting to be assigned by said assignment, was in the store No. Cedar street, which had been occupied by said Robert Waller prior to the execution and delivery of said assignment, during the time that said execution was in the hands of the said Sheriff."

The letter or written request of the plaintiff's attorney is as follows:

"SUPREME COURT.

"WILLIAM J. FORBES
v.
"ROBERT WALLER.

"To JOHN ORSER, Esq., Sheriff of the city and county of New York:

"Sir—Please return the execution in the above entitled cause, delivered to you on the 2d of June, 1856, immediately, as there is probably no personal or real estate belonging to the defendant in your county, out of which the amount or any portion of the same can be made.

"Dated New York, 5th June, 1856.

"Yours, &c.,
"F. R. SHERMAN,
"Plaintiff's Attorney, 74 Wall street."

The Judge states the various facts which he found, and on which he held that the assignment was fraudulent, and intended to hinder, delay and defraud creditors.

He found, as a conclusion of law, "that the plaintiff could maintain the action, notwithstanding the return of the execution, at the written request of his attorney, seven days after its delivery to the Sheriff, under the facts above found."

The assignment comprised all the goods, chattels, and merchandise, bills and notes, choses in action, accounts and demands and other property, whether real or personal, of the assignor, (the same purporting to be set forth in the schedule annexed to said assignment.) That schedule enumerated cash, goods, debts, unsettled claims, and "all other property, claim, and interest, of any kind whatsoever, and wheresoever situated, belonging to said Robert Waller," as being the property so assigned.

The material part of the judgment appealed from is as follows: "That the assignment of the defendant, Robert Waller, is fraudulent and void as against the plaintiff; that the plaintiff recover out of the assigned estate, or the proceeds thereof, in the hands of the Receiver, the sum of $5,764.47, the amount of the judgment, with interest and costs, or so much thereof as the funds in his hands will pay, after deducting his commissions."

The Case shows that the original complaint herein was verified on the 25th of July, 1856; and that on such complaint and on that alone, the plaintiff applied to a Judge of the Court on the 26th, and obtained an injunction against the defendants, and that said complaint, injunction and the summons were served on the defendants therein on the 1st of August, 1856, and these facts are stated in the supplemental complaint.

That Logan was appointed Receiver as aforesaid on the 28th of November, 1856, after the action upon the original complaint was at issue, and on that day Robert and Thomas Waller transferred and delivered the assigned property to Logan, as such Receiver.

Exceptions were duly taken to the conclusions of law embraced in the final decision of the Judge. Some exceptions were also taken to various decisions made during the progress of the trial, which are not here noticed, as they are not discussed in the opinions delivered at General Term. Those which are discussed, are so stated in the opinion of Mr. Justice HOFFMAN, as to render further details unnecessary.

J. Larocque, for appellant.

F. R. Sherman, for respondent.

HOFFMAN, J. The first question is, whether the plaintiff is in a position to sustain this action in consequence of the direction of his attorney to return the execution within seven days, and its actual return within that time.

There are certain facts in the case, besides those noticed by the Judge, of no little consequence.

On the 2d day of June, 1856, the judgment was entered and docketed. On the same day the execution was tested and delivered to the Sheriff. This was returned on the 9th day of June unsatisfied, in pursuance of the written direction of the attorney, dated the 5th, (and before stated at length.)

The counsel for the Receiver produced this testimony.

The original action was commenced to set aside the assignment in question, by service of a summons with the complaint, on the 1st day of August, 1856. The complaint was sworn to on the

25th day of July, and on the 26th day of July, a preliminary order for an injunction was allowed with an order to show cause on the 4th day of August.

The original and supplemental complaint stated the issuing and due return of the execution, so that no objection appeared on their face; and the answers of the assignor and assignee by not denying, admitted all the allegations of the complaint on this subject. The Receiver, in his answer to the supplemental complaint, stated a want of knowledge or information, and controverted these among other allegations. The Receiver, it should be noticed, was appointed in a suit brought by one Dickinson, as a creditor under the assignment, to remove the assignee and distribute the fund. That suit was commenced in May, 1856, and an injunction allowed on the 9th of that month, restraining the assignee and assignor from any interference with the property, and on the 18th day of October, 1856, an order of reference to appoint a Receiver was made, and on the 28th day of November, 1856, the Receiver was duly appointed. Liberty to bring him into this suit by supplemental complaint was granted by an order made on the 20th day of March, 1857.

The assignment purported to transfer the whole property, real and personal, of the assignor.

An action, like the present, to set aside an alleged fraudulent transfer of property, may be brought by the judgment creditor, notwithstanding the provisions as to supplementary proceedings, and the method of redress thus given. The old rules and principles of the Court of Chancery must afford the guide, although the Code may be resorted to for aid and explanation. If there is anything hostile to the former course of proceedings, the Code would control.

It may be useful, first, to advert to the rules which at different periods prevailed as to the issuing and return of an execution. It will aid our examination, and in some respects it becomes important.

By the common law, the Sheriff was not obliged to return a writ of execution until he was ruled so to do. (Watson on Sheriffs, 63; id., 198; *Cheasely* v. *Barnes*, 10 East's R., 72.) There was an exception in case of an *elegit*. (See, also, 6 East's R., 550.)

By our statute, (1 R. S., 1813, 318,) two common days of return were established.

Process issued in term might be tested any day in that term, and be made returnable any day in that term, or the next term. If issued in vacation, it might be tested in any previous term, and be made returnable on any day in the next term.

The Revised Statutes of 1830 adopted the same provision, with some others, as to the duration of the terms, and as respects the issuing test and return of process, not necessary to be noticed. (2 R. S., 197, §§ 4, 5, 6.)

It was the law under these provisions, that the Sheriff was bound to return the writ on the return day without being ruled, and he might be sued in trespass on the case, or be liable to an attachment or amerciament for neglect.

By the general rule of law, also, the Sheriff could not execute a writ after the return day, though he might perfect proceedings commenced before. (*Vail* v. *Lewis*, 4 Johns. R., 450.) A return and a new writ, or perhaps a continuance on the roll merely, was necessary. (*Devoe* v. *Elliott*, 2 Caines' R., 243; see *The Mayor, &c.*, v. *Evertson*, 1 Cow. R., 36.)

This system continued until the statute of May the 14th, 1840. By that, a *fi. fa.* might "be tested and issued at any time after the expiration of thirty days from the entry of the judgment; and such writ shall be made returnable sixty days after the receipt thereof by the Sheriff or other officer." (Sess. L., 1840, p. 334, § 24.)

This appears to bear the construction that the writ could not be returned before the end of the sixty days. I do not know whether this point has been decided.

By the Code, (§ 290,) the execution "shall be returnable within sixty days after its receipt by the officer, to the clerk with whom the judgment is filed."

It is well settled under this provision, that the execution may be returned at any time within the sixty days, so as to warrant proceedings under section 292 of the Code. Collusion or fraud may be shown, and will defeat the proceeding. (*Engle* v. *Bonneau*, 2 Sandf. S. C. R., 679, and cases; 1 Code R., 107; *Morange* v. *Edwards*, 1 E. D. Smith R., 414; *Livingston* v. *Cleaveland*, 5 How. R., 396; *Jones* v. *Porter*, 6 id., 286.)

In *Livingston* v. *Cleaveland*, (*supra*,) the subject was fully examined; Mr. Justice MASON delivering the opinion of the Court. *Cassidy* v. *Meacham*, (3 Paige R., 311,) and *Williams* v. *Hoge-*

boom, (8 Paige R., 469,) were admitted to have settled the rule in Chancery before the Code, that a bill could not be filed until after the return day, although the execution had been returned before. The statute and law, before the act of 1840, and the rule under that act were examined, and the distinction taken upon the language of sections 289 and 290 of the Code, that now the Sheriff may legally return the execution within the sixty days whenever he has made diligent search for property, and become satisfied that the defendant has not property to satisfy the same or any part thereof. It is to be presumed that the Sheriff has done his duty in searching for property, when he has made his return *nulla bona*.

The case of *Jones* v. *Porter*, (*supra*,) was before Mr. Justice PARKER, at Special Term. It is very strong upon this point.

Judge ROWLEY, the County Judge, in *Messenger* v. *Fish*, (1 Code R., 106,) stated the reasons for such a construction of the Code with much force.

It is to be deduced from these cases, that when nothing appears but the fact of a return directed to be made by the plaintiff or his attorney, the inference is that the Sheriff was not left to his proper efforts to collect the amount, but that the intervention with his duty was from some improper or vexatious motive. But, under these decisions, jurisdiction would appear to be acquired, whether the execution is returned before or after the end of the sixty days. The defendant has no longer the absolute right to say that this extraordinary remedy may not be resorted to until the full period given by the law for him to pay the debt under an execution has elapsed, or until efforts to collect it by the legal process have proved ineffectual for that period. The time is no longer absolutely given him, when the Sheriff is authorized by law, on his own responsibility, to abridge it.

Thus, it seems to me, that an official, voluntary return by the Sheriff, before the end of the sixty days, may be treated as a compliance with what the statute deems it essential to establish—that the legal remedy has been exhausted. He subjects himself to a liability for a false return, in case property could be shown which might have been reached, and acts at his peril.

This course of reasoning may justly be regarded as of little weight when the plaintiff, or his attorney, has directed the return

of the execution, and promptly, upon its being issued. The theory upon which an action like the present proceeds, must always be regarded.

While an execution is in the hands of a Sheriff, all leviable personal property is affected by its lien, under and by force of the statute. While it was in life, a bill to set aside a fraudulent transfer, which interferes with the levy, might be sustained, because the lien existed. But if the execution is returned the lien was lost, and the right to sustain the action, apart from statutory provision, was also lost. (*McElwain* v. *Willis*, 9 Wend. R., 548; *Weed* v. *Pierce*, 9 Cow. R., 728; *Watrous* v. *Lathrop*, 4 Sandf. S. C. R., 700; *Cuyler* v. *Moreland*, 6 Paige R., 273; *Crippen* v. *Hudson*, 3 Kern. R., 161; *Bishop* v. *Halsey*, 3 Abbott R., 400.)

But it was equally clear, that a bill in equity, to reach equitable interests and choses in action, could not be filed until after execution returned unsatisfied; and then the authorities before referred to, settled that the creditor must wait until the return day, which the law had prescribed, had passed.

The anomaly might then apparently exist, that, if the execution was returned, leviable property could not be touched; and, if it was not returned, equitable interests could not be reached. The relief, where a fraudulent transfer comprised both, would seem imperfect.

The Revised Statutes met this difficulty by providing that after execution returned unsatisfied, property of every description, whether it could have been taken on execution or not, might be applied to the demand. (2 R. S., 174, § 42.)

Thus, then, the relief which was to be given to a creditor failing to realize his demand at law by the usual process, was given, with these restrictions, and upon the condition of these rules being observed by him.

There is one view in which the case presents a very close point. This action was not commenced until the 1st day of August. The filing of the bill under the old Chancery system was not the commencement of an action, but only the service of a subpoena, or a *bona fide* attempt to serve it. (1 Paige R., 564; 10 id., 1.) Sections 99 and 127 appear to be decisive of the same rule under the Code. The fact that an injunction order

was obtained on the 26th day of July, which was served with the summons and complaint, does not appear to me to affect this view of the case. It is true that by section 139 of the Code, the Court is deemed to have jurisdiction of a case, and to have control of the subsequent proceedings, from the allowance of a provisional remedy, as well as from service of a summons. But as to the parties, an injunction would be inoperative until served, and an attachment until levied.

By the 290th section, the writ is to be returnable within sixty days after its receipt by the Sheriff.

Whatever might be the rule upon the exclusion or inclusion of the day of the delivery of the writ, under the Revised Statutes, and cases upon the subject generally, (1 R. S., 605; 8 Barb. R., 384,) the Code has prescribed a definite rule which must govern the present case.

By section 407, the time within which an act is to be done, as herein provided, shall be computed by excluding the first day, and including the last. If the last day be Sunday it shall be excluded.

Then the sixty days allowed for the return of this writ ended on the 1st day of August, and the suit was commenced on the 1st day of August.

Had the action been commenced on the 2d day of the month, I apprehend that by the strictest rule it would have been sustained, and I do not think the fact of the attorney's procuring or directing a premature return would have varied the case.

It appears to have been admitted, that a Sheriff might have returned an execution on the morning of the return day, and would not be liable, although he might subsequently have executed the writ, provided he had used due diligence before. (*Henmann* v. *Borden*, 10 Wend. R., 367.) We are warranted in presuming that the action was commenced after the actual return on the last day.

The proposition upon which I think the present action can be maintained is this, that although an execution has been returned at the direct instigation of the plaintiff or his attorney, yet if the action be to set aside a fraudulent assignment, and is not commenced until after, or on the actual return day, it can be sustained; and further, that in the present instance, this conclusion is greatly

strengthened by the fact, that at the time of the delivery of the execution, and through the whole period of the sixty days, the assignor, (the debtor,) and the assignee were under an injunction prohibiting their application of any property to the payment of the creditors' demands.

I forbear to enter upon the consideration of other cases in which the right to sustain such an action may exist, without these circumstances, even where the attorney has interfered. Without at all saying, nothing will suffice but what is found in the present case, I think there is sufficient here.

2. The learned Judge has found as matter of fact that the assignment was not accompanied by an immediate delivery, or followed by any actual or continued change of possession of the assigned property, but was made with intent to hinder, delay, and defraud the creditors of the said Robert Waller.

We are not able to say that this result is wrong upon the evidence. On the contrary the circumstances of possession, control, contracts, and negotiations of the assignor which have been proved, appear to us to warrant it.

3. There are some exceptions to the ruling of the Judge during the trial which require observation.

As to the objection by the Receiver to the question, whether the object of the assignor was not to prevent sacrifices in making the assignment? He could have been asked by the defendant in support of the assignment, whether he intended to defraud creditors. (4 Kern. R., 568.) Much more may he be asked as to his intentions and objects, by the adverse party.

The other question which the defendant asked, and the Court rejected, was, whether there was any agreement between the assignor and the assignee, that he (the assignor) was to continue in possession of the property? (To the decision excluding an answer to this question, the appellant excepted.)

It may be that this ought to have been allowed. But when the fact of an actual continuance in possession is made out by competent evidence, the fact whether there was or was not a prior agreement for it, seems immaterial.

I think the judgment should be affirmed.

MONCRIEF, J., concurred

Bosworth, Ch. J. (Dissenting.) It was settled law, prior to the Code, that a creditor's bill, to reach the choses in action of the judgment debtor, could not be filed, until an execution had been issued and returned unsatisfied. And although an execution had been so issued and in fact returned, such a bill could not be filed until after the return day of the execution was passed. (*McElwain* v. *Willis*, 9 Wend., 548; *Crippen* v. *Hudson*, 3 Kern., 161.)

That such a bill could not be filed until after the return day of the execution, was decided in *Cassidy* v. *Meacham*, (3 Paige, 311,) and the rule was re-asserted in *Williams* v. *Hogeboom*, (8 id., 469.)

In *Crippen* v. *Hudson*, (*supra*,) it was declared that the rule since the Code, is the same as it was before the Code was enacted. The preëxisting practice not inconsistent with the Code, is by the Code continued in force. (Code, § 469.)

In the present case, the execution was issued on the 2d of June, 1856, and returned on the 9th of the same month, and this action was so far commenced on the 25th of July, 1856, the fifty-third day after the execution was issued, that the complaint was verified on that day. An injunction was granted on the 26th, and these papers and the summons were served on the 1st of August, 1856, the sixtieth day after the execution was received by the Sheriff.

By the Code, an execution is "returnable within sixty days after its receipt by the officer" to whom it is directed. (Code, § 290.)

This action, as a creditor's suit to reach property not liable to be levied upon by an execution, cannot be maintained. It was commenced before the return day of the execution; and the execution was actually returned within seven days after it was issued, at the written request of the attorney of the plaintiff in such execution.

Can it be sustained, as a suit by a judgment creditor, who, at the time it was commenced, had a specific lien upon the property which he seeks to reach; to remove, through the aid of a court of equity, a fraudulent obstruction interposed by the debtor to the executionof process by which, but for such fraudulent obstruction, the property might be levied upon and sold? Whether the property which the creditor seeks to reach be real or personal, if the latter be property leviable by execution, it is essential to his right to

institute a suit to remove a fraudulent transfer of it, that he has "obtained a lien on such property."

If it be real, he must have a judgment docketed, which would be a legal lien, if the fraudulent transfer had not been made. If it be personal, he must have issued an execution and have had a levy made on the property; either an actual levy, or a constructive one, by having placed the execution in the Sheriff's hands to be executed. (*McElwain* v. *Willis*, *supra*; *Greenwood* v. *Brodhead*, 8 Barb., 593–597; approved by the Court of Appeals, in *Crippen* v. *Hudson*, 3 Kern, 161.)

If it be settled that an execution must be issued to the Sheriff to be levied, to create a right to institute such a suit, it would seem to be illogical to hold that the creditor may procure his execution to be immediately returned, and then commence such a suit.

The moment the execution is so returned, the creditor ceases to have any lien, either actual or constructive, on such personal property. And if the existence of the lien is essential to the right of action, it would seem to follow, that the plaintiff had no right of action in respect to such property, when this suit was commenced. It is quite clear, that any other creditor, by levying on the property in question, (*i. e.*, on such of it as could be taken upon execution,) between the actual return of the plaintiff's execution and the appointment of a Receiver, would hold the property in preference to this plaintiff.

If another creditor, by levying an execution before the appointment of a Receiver, can wholly defeat the action, that fact would furnish a strong argument against assuming jurisdiction over it.

In *McElwain* v. *Willis*, (9 Wend., 561,) Mr. Justice NELSON said, that "the property out of which the judgment creditor is seeking to satisfy his debt, must be subject to the judgment if real, and to execution if personal property. The jurisdiction of the Court rests upon the right or title to the property in question, acquired by the proceeding at law upon the judgment or execution, and consequently the return of the latter by the officer is not only not essential, but would be fatal to the relief sought."

In the same case, Senator TRACY said, "the plaintiff must show that he has issued an execution into the county where the property is situated, and obtained a specific lien thereon, by the

actual or constructive levy of the Sheriff." As the aid of the Court is sought to enforce a legal lien, "it is indispensable it should appear from the bill that this legal lien then exists." (Id., 568, 569.)

This rule is stated in terms as explicit, in *Greenwood* v. *Brodhead*, (8 Barb., 597,) and in *Crippen* v. *Hudson*. (3 Kern., 167.)

For these reasons, I think the action cannot be maintained to reach personal property, in its nature liable to be taken upon an execution, or the choses in action of the judgment debtor.

The assignment in question includes only these two kinds of property, viz., leviable personal property and choses in action. The judgment appealed from, does not profess to affect any other property.

It is true, that the Code allows proceedings supplementary to execution to be instituted, when the execution has been actually returned unsatisfied, although the return day has not elapsed. (§ 292.)

And there would seem to be no reason for not allowing an action to be commenced, when the right to institute such proceedings is perfect.

But in all cases in which they have been instituted in this Court before the return day of the execution, this Court has discharged them on its being made to appear that the execution had been prematurely returned at the request of the plaintiff's attorney. The Court requires a return by the Sheriff, made in the discharge of his duty, upon his own responsibility, and will not grant an order under section 292 of the Code, before the return day of the execution, when the return has been procured by the attorney.

If that practice, (which is supposed to be in harmony with the rule which requires a creditor to exhaust his remedy at law before going into a court of equity,) be correct, then the Code has not, (even by implication,) so changed the preëxisting practice, as to authorize a creditor's suit to reach choses in action, to be instituted before the return day of the execution, when its earlier return has been procured by the interference of the attorney.

If the rule, as uniformly stated and applied, that to reach leviable personal property it is essential to give jurisdiction that the plaintiff has obtained a lien upon it, existing when the action is commenced, is to be adhered to; then the present action cannot

be maintained, in so far as it respects such property, as the plaintiff had no such lien when it was commenced.

I think, that the "return day" of an execution issued under the Code is as certain, in fact and in law, as one issued under chapter 386 of the Laws of 1840. By section 24 of the latter act, (Laws of 1840, p. 334,) "writs of *fieri facias*" * * "shall be made returnable sixty days from the receipt thereof by the Sheriff or other officer to whom the same shall be directed."

By section 290 of the Code, "the execution shall be returnable within sixty days after its receipt by the officer, to the clerk with whom the record of judgment is filed."

Under the act of 1840, the execution, in the body of it, declared that it was returnable sixty days from its receipt by the Sheriff. Under the Code, an execution, by section 289, need not declare in the body of it when it is returnable. The return day is declared by a general statute, viz., Code, section 290.

The return day of a writ, is that on which, by law, it is declared to be "returnable."

If not returned on or before the sixtieth day after its receipt, the officer may be sued in case. (2 R. S., 440, § 77; 4 Sand., 67; 3 Seld., 550.)

He cannot be sued or attached for not returning it at an earlier day. (Rule 6 of the Rules 1854, and Rule 8 of the Rules of 1858.)

The execution in this case, is made by law "returnable" within sixty days after it was received by the Sheriff. He is required by statute to indorse on it the date of its receipt by him. The Sheriff, if he returns it before the sixtieth day after its receipt by him, returns it at his peril. He cannot be compelled to return it, nor be sued for not returning it sooner. It continues in force during the sixty days after its receipt, and may be levied as well on the sixtieth day after, as on the day of its receipt.

Its return day is as fixed and certain under, as before the Code. "Returnable" "sixty days from" its receipt, and "within sixty days after its receipt," mean the same thing.

The Code does not say, that the Sheriff may return it at any time within sixty days after its receipt; but, on the contrary, fixes its return day, by declaring when it shall be "returnable."

A writ can have but one return day, and that is the day on which, by its terms or by general law, it is made "returnable."

I think, therefore, that under the act of 1840, and under the Code, the return day of an execution is as certain in intendment of law, as of one issued prior to the act of 1840.

And that a return of an execution (issued under the Code) within seven days after its receipt by the Sheriff, on the request of the plaintiff's attorney, no more exhausts a creditor's remedies at law, than an equally prompt return, by the like interference, of an execution issued under the act of 1840, or before that act was passed.

If the practice, which is understood to be observed by the Courts generally, that proceedings supplementary to execution cannot be upheld, if instituted before the return day of the execution, when such earlier return has been procured by the interference of the attorney, be in harmony with a correct interpretation of section 292 of the Code, then it would seem to follow that this action was commenced before it could have been commenced under the law as it was prior to the Code, and before there was any right to commence it under the Code, even conceding the former practice to be so far modified by the Code that the right to bring a suit is perfect, whenever the right to institute proceedings under section 292 is absolute.

For all practical purposes, this action was commenced as early as the 26th of July, 1856.

The plaintiff then appeared in Court with his verified complaint, and upon that alone applied for and obtained an injunction. Without the presentation of a complaint on the application for an injunction, none could have been granted. (Code, § 219.)

From the granting of that, the Court acquired jurisdiction of the action and of the proceedings therein, (§ 139,) for certain purposes, though not an effectual jurisdiction (for all purposes) of the persons of the defendants, until the summons had been served, or they had voluntarily appeared.

If, on the 27th of June, the defendants, with knowledge that the injunction had been granted and of its contents, had disposed of the property in question with intent to evade it, and expecting immunity from the fact that the summons had not then been

served, it is by no means clear that they could not have been punished for a contempt. (*The People* v. *Sturtevant*, 5 Seld., 277, 278; *The People* v. *Compton et al.*, 1 Duer, 553, and cases cited at the foot of that page.)

The right to maintain this action is opposed, therefore, by the facts: 1st. That the execution was returned in seven days after it was issued, and "was so returned by the request of the plaintiff, by his attorney, in writing." No attempt was made to execute it.

2d. On the 26th of July, 1856, the plaintiff applied to a Judge of the Court for and obtained an injunction in this action, that being the fifty-fourth day after execution issued, and six days before its return day. The injunction was granted on a complaint in this action which was verified on the previous day.

3d. The summons, complaint and injunction were served on the 1st of August, the return day of the execution. That being done, it cannot be denied that certain proceedings were taken in the action before the return day of the writ, and that the whole proceedings are based upon a return made by the Sheriff, not in the responsible discharge of and according to his convictions of his official duty, but upon the written request of the plaintiff, which would be an answer to an action brought by the latter for a false return.

Under such circumstances, I think the action cannot be maintained without overruling adjudged cases; either as an action to reach leviable property on which the plaintiff had a legal lien, when it was commenced, or as a creditor's suit to reach choses in action, after the issuing and due return of an execution unsatisfied.

Entertaining these views, and not feeling at liberty to disregard established practice which section 469 of the Code continues in force, I think the judgment should be reversed and a new trial granted.

Judgment affirmed.

THE MINISTER, ELDERS AND DEACONS OF THE REFORMED PROTESTANT DUTCH CHURCH OF THE CITY OF NEW YORK, Appellants, *v.* WILLIAM H. PARKHURST, Defendant and Respondent.

1. Where, by the terms of an indenture of lease, it is agreed that, at the expiration of the term thereby granted, the lessor shall either grant a new lease upon terms stated, or shall pay the value of any buildings then standing on the premises which the lessee may have erected conformably to provisions contained in the lease, and that such value shall be "ascertained by appraisers," one to be nominated by the lessor, and the other by the lessee, and if such two appraisers cannot agree, that they "shall nominate an umpire or third person," and that the valuation of the three, or any two of them, shall be conclusive; and where such lessor, in the January preceding the expiration of the term, elected not to give a new lease, and he and the lessee thereupon severally nominated an appraiser of the value of the buildings, and the two appraisers so selected could neither agree upon the value, nor upon an umpire, and thereupon other two appraisers were selected with a like result, and thereupon the lessor selected a third appraiser, and the lessee insisted upon the one whom he had secondly nominated, to act as appraiser on his part, and refused to nominate any other, and the parties themselves could not agree upon the value, it was *held*, that the lessor could institute an action against the lessee, to have the extent of the liability of the former ascertained and determined, and the liability itself extinguished by the payment by the lessor of such sum as should be ascertained to be the just value of such buildings.

Before BOSWORTH, Ch. J., and HOFFMAN, SLOSSON, PIERREPONT and MONCRIEF, J. J.)

Heard, February 26; decided, April 30, 1859.

THIS is an appeal by the plaintiffs from a judgment rendered against them, on a demurrer to their complaint.

The plaintiffs, by an indenture of lease dated the 1st of February, 1836, demised certain real estate therein described to Wm. H. Parkhurst, Administrator, for a term of years, to wit: for twenty-one years from the 21st of May, 1836; which lease, with all the covenants contained in it, was subsequently extended and continued in force until the 1st of May, 1858.

It was stipulated in the lease, that "at the expiration of the term thereby granted," the plaintiffs, "at their election," should either grant a new lease, upon terms stated, to the lessee, his exe-

cutors, administrators or assigns; or should pay "the value, in good and lawful money of the United States of America, of all such stone and brick buildings as shall or may be erected on the same demised premises by the said party of the second part, his executors, administrators or assigns, agreeable to such plan or plans as may be approved by the said parties of the first part, their successors or assigns, or by any committee by them to be appointed, and which shall then be standing on the hereby demised premises, and that the value of such stone and brick buildings shall in such case be ascertained by appraisers, one to be nominated by the said parties of the first part, their successors or assigns, and the other by the said party of the second part, his executors, administrators or assigns.

"And if the two persons so nominated shall not agree respecting the value of the said buildings, that then the said two persons shall nominate an umpire, or third person, which said three persons, or any two of them, shall make such valuation or appraisement in writing, under their hands and seals, and that the valuation or appraisement so to be made, shall be conclusive and binding upon the parties to these presents, and upon all others interested or concerned therein."

In 1847, the defendant became the owner in his own right of the indenture of lease, and of the term thereby granted.

By a written agreement between him and the plaintiffs, made on the 3d of March, 1857, "the said lease all the covenants therein contained," * * "were renewed and continued for one year" from the 1st of May, 1857, at a rent of $900, to be paid quarterly.

The plaintiffs, before the 1st of May, 1858, elected not to grant a new lease, and so notified the defendant. Thereafter, and in January, 1858, the plaintiffs and defendant being unable to agree on the value of buildings which had been erected on the demised premises, selected William R. Tucker and Peter R. Stelle to value them; the plaintiffs selecting the former and the defendants the latter. They were unable to agree upon the value, or to agree upon an umpire.

Subsequently, and on the 23d of January, 1858, the plaintiffs selected William A. Thompson, of the city of New York, and the defendant selected David S. Manners, of Jersey City, to value

the buildings. They could not agree upon the value, nor upon an umpire.

On the 15th of February, 1858, the plaintiffs offered to make a third attempt to obtain a valuation, and selected Wyllis Blackstone to act as an appraiser for that purpose, provided the defendant would select, on his part, another. The defendant met the offer by naming the said David S. Manners as the appraiser on his part, and expressed no willingness to name any other.

The plaintiffs own the demised premises in fee, and in their complaint, after setting forth the facts before stated, aver a willingness, and wish, and the ability to pay to the defendant "the just, true and fair value of said buildings," and that they "have been also always desirous to have the said buildings appraised, and their true value ascertained, and to pay the same to the defendant." The prayer of the complaint read thus:

"And the plaintiffs pray that this Court may decree the value, or appoint a suitable person or persons to appraise the value of the brick buildings on the premises above described, and known as number ninety-seven Fulton street, and that the defendant be adjudged to accept the sum which shall be fixed by this Court as the value of said brick buildings, in full for the same, and for all and singular any right, title, interest, and claim which he may have in said buildings, under said lease, or otherwise; and that he, the defendant, be adjudged to pay to the plaintiff the whole, or a just and equitable proportion of the costs and expenses of this action."

This action was commenced on the 12th of March, 1858. The defendant demurred to the complaint, on the ground "that the same does not state facts sufficient to constitute a cause of action."

The demurrer was argued at Special Term before Mr. Justice HOFFMAN, who, on the 3d of October, 1858, gave judgment for the defendant, dismissing the complaint with costs.

From that judgment the plaintiffs appealed to the General Term.

Daniel Lord, for appellants (the plaintiffs).

I. The value of the buildings is due in equity, although not in law, from the plaintiffs to the defendant; the buildings were erected and the lessors adopted and offered to pay for them under the conditions in the lease.

1. The case, therefore, is not liable to the objection that the plaintiffs show that there is no claim on them. This was the objection in *Field* v. *Holbrook*, and on which alone it was determined. (6 Duer R., 602.)

2. It is not the case of a proposed bargain on the valuation of either the parties themselves or strangers, which valuation was to precede the vesting of property; as in the cases cited in the latter part of the opinion in *Whitlock* v. *Duffield*. (1 Hoffman Ch. R., 118.) But here the tenant's erections had been made, the landlord had approved them, and offered to pay their value, as it should be determined under the lease.

3. Nor is it the case of a covenant void for uncertainty, as in the principal case in Hoffman's Reports.

Those cases do not affect this decision.

II. The complaint does not show a case where the defendant can recover at law; there has been no valuation, nor any default in the plaintiff, defeating one.

1. The plaintiff was bound only to one effort to value, which was fairly made, and was ineffectual. He, therefore, is not liable on the covenant in an action at law.

2. But even if the third nomination had been the one to be considered, that was defeated without the plaintiff's fault. They were not bound to take a nominee of the defendant who had formed an opinion on a previous disagreement. He was not an impartial man as between the parties, and it was, in law, a fraud on the covenant to nominate him.

3. The time for the appraisal was not premature; since it was only a reasonable time before the end of the term, the payment was then demandable, and the buildings might have been destroyed the day after the end of the term, and so the valuation become impracticable by actual examination.

III. The case was one of a merely equitable liability, to the defendant, for a sum to be ascertained in a mode which the Court should decide to be just. The defendant could have sustained a complaint in equity for the value, on the ground that his remedy at law had been lost by the accident of the appraisers' disagreement

1. The possession by us of the buildings, or offer to pay previous to suit, and our complaint, show an equitable right.

2. The defendant, in analogy to a claim for specific performance of the covenant, had a right to go into equity; such right is mutual. (5 Price Ex. R., 526.)

IV.—1. The defendant having a right to apply for equitable relief, the plaintiff has a like right, according to the law of the mutuality of equitable remedies.

2. Also, because the state of the buildings to be valued is daily changing, so that the valuation cannot be made at any time so justly as at the nearest time to the end of the term.

3. It is a case for the cancellation of a claim; for the plaintiffs' defense becomes more uncertain and difficult by lapse of time.

V. The complaint is not analogous to one for the appointment of arbitrators, and substitute another tribunal than a Court of Justice. It is the reverse: the resort to a Court of Justice to have that done which has been defeated by the accident; that the appraisers have been unable to agree.

VI. The judgment allowing the demurrer should be reversed, remitting to the Special Term for a judgment to be rendered according to the complaint, unless the defendant shall answer.

James R. Whiting, for respondent (the defendant).

I. The plaintiffs, by their own showing, are in the possession of the premises in controversy, and show no injury; therefore, no action lies in their favor.

II. If, indeed, the plaintiffs had shown, by their complaint, that they had sustained damage by the acts of the defendant, their only remedy is on the covenant. (*The Mayor of New York* v. *Butler*, 1 Barb. S. C. R., 325.)

III. Conceding that the defendant had neglected to name an arbitrator under the covenant, if the plaintiffs, as they did, reëntered the demised premises and ejected the defendant, the relief demanded is not within the powers of the Court.

IV. The complaint does not show that the plaintiffs, subsequent to the granting of the renewed lease for one year, had elected not to grant a new lease of the premises in the complaint described.

V. The action is premature, having been commenced before the expiration of the renewed term.

VI. The defendant fully complied with the terms of his covenant. The plaintiffs are in fault. They have no right to refuse

to permit their arbitrator to proceed with the person named by the defendant. What evidence is there that Mr. Blackstone and Mr. Manners would not have agreed?

VII. This is, in fact, a suit by a debtor against his creditor. No such suit has ever been maintained; at least, we have not as yet found any such reported in the books.

By the Court—Bosworth, Ch. J. There can be no doubt that the plaintiffs are liable to the defendant, for the value of the buildings in question on the 1st of May, 1858.

I think there is no doubt of the right of the defendant to maintain an action at law to recover such value, inasmuch as the mode provided by the covenants in the lease to ascertain such value has failed to accomplish that result, without any fault of either party. *Thompson* v. *Charnock*, (8 T. R., 184,) *Haggart* v. *Morgan*, (1 Seld., 422,) *Greason* v. *Keteltas*, (17 N. Y., 491,) *Cooper* v. *Shuttleworth*, (34 Eng. L. & Eq., 551,) *Clarke* v. *Westrope*, (37 id., 313,) and *Avery* v. *Scott*, (20 Eng. L. & Eq., 327, 8 Exch. R., 487, and *S. C.*, 36 Eng. L. & Eq., 1,) seem to support this proposition, and leave its accuracy free from doubt.

If this be so, then it follows that the plaintiffs may be sued for such value at any time before the statute of limitations will operate as a bar. They must pay the costs of such action. (Code, § 304, sub. 4.) The defendant may select his own time of litigating the question of value, with the certainty that the plaintiffs must pay the expense of the litigation.

If the facts, that the value of the buildings, on the 1st of May, was payable on that day, and that the plaintiffs have, at all times since, had the use of such value, in the rents and profits of the buildings, shall be held to make them liable to pay interest, then they must occupy the position of borrowers against their will, so long as the defendant chooses to be their creditor.

The plaintiffs and defendant cannot agree upon the value of the buildings. Two several sets of appraisers have been unable to agree. It is, therefore, evident, (assuming, as we must, all the appraisers to have acted honestly,) that it is a matter of difficulty, even now, to ascertain such value. That difficulty has, thus far, proved to be insuperable, while the buildings are standing and in the very condition in which their value is to be determined, and

at the very time fixed to ascertain it. It is obvious that the difficulty must be, in reality, greater, when the buildings shall have been destroyed or materially changed, and when an inspection of the buildings as they were when their value was to be ascertained cannot be had to aid witnesses in forming a judgment or to make it practicable for them to state the actual facts to enable a jury to determine it.

The plaintiffs are not in a condition to know what sum is the just value, so that they may tender it, and thus relieve themselves from all hazards as to liability for interest, and from the costs of any suit the defendant may bring.

This difficulty is produced, not because they have improvidently made a contract which, by its terms, places them in this disadvantageous position, but because, notwithstanding provisions were inserted in the contract for ascertaining the value, which, according to common experience, have proved sufficient and effectual in like cases, those provisions have become spent, without accomplishing, in any respect, the purpose intended.

No action at law, and no remedy which the law has provided, is adequate to relieve them. Their right to pay, and thus terminate their liability, is as absolute and perfect as the right of the defendant to be compensated for the value of the buildings.

There can be no doubt of the accuracy of the general principles, (whatever difficulty may be experienced occasionally in making their true application,) that a court of equity has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the courts of common law. The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for if, at law, it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of a party in a perfect manner, at the present time and in future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require. (Story's Eq., § 33.)

Bills in the nature of writs of prevention, commonly called bills in equity *quia timet*, are entertained to accomplish the ends

of precautionary justice. They are ordinarily employed to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity because he reasonably fears some future probable injury to his rights or interests, and not because any injury has already occurred which requires any compensation or other relief. The manner in which this aid is given by courts of equity is, of course, dependent on circumstances. (Id., § 826.)

Hence, when one party has a defense valid in law, but which rests upon evidence which he is in danger of losing, if the adverse party is suffered to delay the prosecution of his claims, he may, on this ground, invoke the interposition of a court of equity to secure a determination of the controversy, and an exemption from the hazards of a purposed delay to prosecute.

It is asserted, not as a mere rhetorical expression, but as in itself just, that "the beautiful character, or pervading excellence, if one may so say, of equity jurisprudence is, that it varies its adjustments and proportions, so as to meet the very form and pressure of each particular case in all its complex habitudes." (Story's Eq., § 439.)

We think it is unjust that a man should be compelled against his will and without his fault, to have a demand continually hanging over him.

This injustice is more marked and severe, when without fault on his part, or any neglect in not inserting in his contract provisions suitable, according to the common course of human experience, to put it in his power to discharge himself from liability by tendering full performance, he is left in the condition, that the law has provided for him no means to ascertain the extent of his liability, nor furnished him with any remedies which he can employ to make satisfaction.

The injustice is aggravated, when in addition to the embarrassments already suggested, lapse of time is rendering it, from year to year, more difficult to ascertain the measure of his just liability, and when even a few years may destroy the property itself, the fair value of which, on a given day, in the condition it then was, is the sole measure of liability.

We think it no answer to this objection, that the difficulty of the defendant, six or twenty years after the day when the value

was to be ascertained, to show what it in truth then was, and his risk of losing by such delay will be as great as that of the plaintiffs.

The plaintiffs, unless guilty of some wrong or default deserving such a punishment, should not be exposed to such hazards.

The ends of justice cannot be promoted, human rights cannot be protected, nor can tribunals instituted to enforce rights, and prevent and redress wrongs, commend themselves to the esteem of mankind, by acting on the principle, that one party will stand as good a chance as the other by speculating on the issue of a suit, the trial of which is purposely delayed, until the best evidence attainable is impaired or destroyed, and acting on it because one party is willing and determined to take such chances, and on the further ground that the Courts have no power to relieve the other from the perils of such a trial.

We cannot but think it would be a reproach to the administration of justice, if the Courts by reason of their constitution and powers were coerced to hold that they were incompetent, on such a state of facts to relieve a party who desires and offers to do justice, but is unexpectedly and without fault placed in a condition that he cannot know what, in judgment of law, it is his duty to do, and has no means by any aid a court of law can extend to him, to ascertain the extent of that duty, or to perform it.

If these plaintiffs had entered into a contract like the present, without providing a mode of ascertaining the extent of the liability they were incurring, which, according to the ordinary course of human experience, would be adequate and effective, their claims to the interposition and aid of a court of equity might be different.

However that may be, it seems to us but a just and reasonable application of the rules we have stated, to a case of such peculiar facts and circumstances as the one before us, to hold, that the plaintiffs are entitled to relief; that it is strikingly unjust that the defendant should be permitted to compel the plaintiffs to litigate the question of the value of these buildings at a period so remote that no vestige of them may then be left, instead of litigating it when they can be seen by persons competent to determine their value, and who can thus determine such value, by a thorough examination of them, (the true value of which cannot be reached

in any other manner,) and who can speak of that value not only on such inspection, but with their present, and a more perfect knowledge of such property, than they can be supposed to possess after the lapse of years, during which the opinions of all competent judges of value may vary from time to time, with the change of circumstances, and the constantly recurring depression and increase in values of such property generally, as well as in particular localities.

The great hazard of loss and injustice to which the plaintiffs would be exposed by subjecting them to such a necessity, in connection with the facts that they are utterly without any remedy at law, and that they are placed in this condition without fault, or neglect on their part, either by having made an unreasonable contract, or by omitting to do all that was reasonable in the premises, is sufficient, in our opinion, not only to justify the Court in taking jurisdiction of this action, but makes the exercise of jurisdiction a duty.

The judgment must be reversed and judgment entered in favor of the plaintiffs, but with liberty to the defendant to withdraw his demurrer, and answer in twenty days, in which event, the plaintiffs' costs of the demurrer at Special Term, and of this appeal, are ordered to abide the event of the action.

HOFFMAN, J. I concur in the conclusion that the order made below should be reversed, upon a course of reasoning which has resulted in the following propositions:

1. It is perfectly clear that the defendant has a right to an action at law for the value of his buildings, and that the covenants or stipulations in the lease as to an arbitration, could not interfere with such an action, with or without the fact of their having proven unavailing. (*Thompson* v. *Charnock*, 8 T. R., 139; *Haggart* v. *Morgan*, 1 Seld., 422; *Greason* v. *Keteltas*, 17 N. Y. R., 491; *Cooper* v. *Shuttleworth*, 31 Eng. L. & Eq. R., 551; *Clarke* v. *Westrope*, 37 id., 313; *Coffin* v. *Talman*, 4 Seld., 465.)

2. I consider it doubtful whether the plaintiffs can sustain any action at law, in any form, for breach of covenant or otherwise, against the defendant. It may be, that under the case of *Livingston* v. *Ralli*, (30 Eng. L. & Eq. R., 280,) an action at law could be so shaped as to be tenable. But if so, it would be incomplete,

inadequate, and leave the main controversy between the parties undetermined. It would not drive the defendant to assert his right to the value of the buildings, by way of counter-claim. He is not compelled to do this by an answer, but may subsequently resort to his action. (*Halsey* v. *Carter*, 1 Duer, 667.) Whatever could be attained, if anything, by an action at law, would be inconclusive and inoperative upon the main question as to the rights and relations of the parties.

3. The plaintiffs are therefore without any legal redress, or mode of asserting any right upon the case they make, or without any appropriate, full and adequate mode of redress, unless they possess it through an equitable action—what could have been the subject of a bill in Chancery before the Code.

4. The next question then is, Is there any admitted head or doctrine of a court of equity which will entitle the plaintiffs to its interference upon the case as made in the complaint?

After a careful study of the lease in question, I find in it a contract by which the buildings were to be valued at the expiration of the term. I find an obligation on both parties that this shall be done at that period, and an equal implied obligation to unite previously in any measure necessary to accomplish this. The method pointed out, viz., by arbitration, could not be enforced in equity, and would not bar an action at law, but it is evidence of the intention and meaning of the contract, that the valuation shall be made at or by the prescribed period. The duty of the defendant to concur in all legal means to effect this, is as clear to my mind as the duty of the plaintiffs to pay such value.

If the agreement had been in explicit terms, that the buildings should be valued on or before a designated day, and the parties would unite in any measures for procuring it to be done by the arbitration of A and B, or a suit in a competent Court, there can be no question that, after demand and refusal to arbitrate, an equitable action could be sustained. I find enough of agreement in the lease to make the same rule applicable.

"Courts of equity will interpose in many cases to decree a specific performance of express and even of implied contracts where no actual injury has as yet been sustained, but only is apprehended from the peculiar relations of the parties. This proceeding is commonly called a bill *quia timet*." (Story Eq. Jur., vol. 2, § 730.)

The remark is true, that the principle of a bill of this nature is contract. The ordinary example of a surety compelling the debtor to pay the demand when due, illustrates this position.

5. It is suggested that, upon this view of the case, there must be mutuality of obligation. The one party, (the defendant here,) must have a right to go into a court of equity, or the other, (the plaintiffs here,) have no such right.

The doctrine of the necessity of a mutuality of legal obligation in its broad sense, as applicable to contracts, once asserted by Chancellor KENT, is indisputably wrong. Under the statute of frauds, one party may be bound when the other is wholly freed. (Willard's Eq. Jur., and cases, p. 267; *Woodward* v. *Aspinwall*, 3 Sandf. S. C. R., 272.)

In another sense, the proposition is strictly right. In the meaning that, in cases out of the influence of the statute of frauds, one party may not have an equitable remedy upon a contract, when the other cannot have any remedy at all, it is a rule intelligible and well warranted. But I do not understand that, in order to get relief in equity within this rule, it is essential to show that each party has redress in equity, and no redress at law; or to show that each party has some, but an inadequate, redress at law, and, therefore, a remedy in equity.

On the contrary, when mutuality consists in the right of one party to get full relief and satisfaction of his contract, yet only through equity, and of the other to get all he can demand, but only at law, I cannot see why the law of mutuality, or reciprocal obligation, is not fully satisfied. The law gives redress. Some human tribunal administers it. It is unimportant which performs the office, or in whose favor. (Story Contr., vol. 2, § 741.)

But suppose this view is unsound, then the rule laid down by Sir JOHN LEACH in *Adderly* v. *Dixon*, (1 S. & St., 607,) covers the whole case. He says "that it has been settled, by numerous decisions, that the remedy in equity must be mutual, and that where a bill will lie for a purchaser, it will also lie for the vendor." This was applied to the case of a seller of rights to future dividends upon a bankrupt's estate, which debts had been proven. The price was 2*s.* 6*d.* in the pound. The purchase money was therefore definite, but damages at law would not accurately represent the value of the future dividends.

6. If I am warranted in deducing from the lease in question, an agreement, such as I have stated, to have the buildings appraised and paid for at or by a definite time, wholly irrespective of the method of doing this pointed out, then the power of the Court to enforce such a contract is indisputable. (Story, § 729.)

Judgment reversed, with liberty to defendant to answer.

ANTHONY, Plaintiff and Respondent, *v.* SMITH, Defendant and Appellant.

1. On an appeal from a judgment in an action tried by a jury, the appellant cannot be heard upon the question whether the verdict is contrary to evidence.
2. The only appeal on which he can be heard, on that question, is one taken from an order refusing a new trial.
3. On an appeal from the judgment, he can be heard on exceptions taken at the trial, if the exceptions have been duly settled.
4. A physician, who has attended a party as such, on his being assaulted and bruised, may, as an expert, testify as to the effect produced thereby upon the health and mind of the party injured.
5. The Court, in its discretion, may limit the number of witnesses to be examined to a particular point; and the exercise of that discretion is not the subject of an exception which can be heard on an appeal from the judgment. If it is exercised indiscreetly, and to the actual prejudice of a party, his remedy is a motion for a new trial upon a case.
6. It is within the discretion of the Judge whether he will allow either party, after he has rested and the evidence on the part of his adversary has been given, to call other witnesses to points as to which he had previously examined witnesses.
7. A motion for a new trial on a case, or on the ground of surprise, or of newly discovered evidence, cannot be made as a matter of right after judgment has been perfected.
8. The separation of a jury, after they have retired to deliberate, without the consent of the Court, does not, *per se*, entitle a party to a new trial.
9. Where there is no reason to suppose that either party has been prejudiced by such separation, and where, during such separation, the jurors did not converse with any person concerning the cause, a new trial will not be granted on account of such separation, even though the motion be made before judgment perfected.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 4; decided, April 30, 1859.

THIS action comes before the Court at General Term, on two appeals taken by the defendant, which were argued together.

The action is brought to recover damages for an assault and battery committed by the defendant upon the plaintiff. It was tried before Mr. Justice SLOSSON and a jury, on the 5th of March, 1858, and the plaintiff recovered a verdict for $500. On the 12th of March, 1858, judgment was entered on the verdict, and a judgment-roll filed. Notice of the judgment was served on the 7th of April, and a notice of appeal from the judgment was served on the 6th of May, 1858.

On the 14th of April, 1858, the defendant served notice "that, on the proceedings in this cause, and the case and affidavits" served therewith, he should move the Court, on the 22d of April, 1858, "for an order setting aside the verdict in this action, and the judgment thereon, and granting a new trial in this cause, on the ground of irregularity and errors on the part of the Judge who tried the same, and on the part of the jury, and on the ground that the verdict is against the weight of evidence, or for such other or further order or relief as the Court shall see fit to grant." The motion was continued by adjournments into October, 1858, when it was made before BOSWORTH, Ch. J., and denied. The motion was not, in fact, argued; but it being stated that an appeal from the judgment was pending, that notice of the motion had been given after judgment was perfected, and that the defendant was desirous to be heard on the matter before the General Term, an argument was waived, and the order states that defendant's "motion for a new trial is denied *pro forma*, with leave to the plaintiff to object on the appeal to the right of the defendant to make this motion, because of the perfected appeal from the judgment now pending in the General Term on said case, and also to the reading of the affidavits herein on the ground that the verdict of the jury cannot be impeached by affidavits of a juryman as to what was said in the jury room." From that order, the defendant appealed.

The answer did not deny the commission of the assault and battery, but alleged matters of provocation to mitigate damages. The defendant, after assaulting plaintiff in the street, took him by force into a back room in defendant's store, and assaulted and beat him while kept by force in such store.

When the defendant had examined six witnesses as to what occurred while the plaintiff was in the defendant's store, his counsel "then called William Schmidt as a witness, but was asked by the Court what was intended to be proved by him, when defendant's counsel said it was as to the same matters as already proved by the other witnesses, and that he had a number of other witnesses also to the same matters; whereupon the Court refused to hear more testimony to those matters, as unnecessarily cumulative, and defendant's counsel excepted."

The plaintiff was examined as to what occurred while he was in the store, and one witness was also examined as to a conversation alleged to have been had there between the plaintiff and the defendant.

Dr. Rowland, the physician who attended the plaintiff, on account of the injuries inflicted by the battery, was recalled, and testified thus: "I know the plaintiff's constitution.

"*Q.* What will be the probable permanent effect upon the plaintiff's constitution and mind of such injuries as he received?

'(Defendant's counsel objected to the question. The Court overruled the objection, to which defendant's counsel excepted, and the exception was duly noted.)

"*A.* It is impossible to answer the question as it is put. What would be, is one thing; what is, is another.

"*Q.* What is the effect of the injuries upon the plaintiff?

"(Defendant's counsel objected to this question. The Court overruled the objection, to which defendant's counsel excepted, and the exception was duly noted.)

"*A.* It made him very nervous. I discovered the effect of it for a year.

"*Q.* What effect did it have upon his mind?

"*A.* I think it incapacitated him for a time from doing business."

When the plaintiff rested, "the defendant offered to call other witnesses as to what occurred in defendant's office, in corroboration of those who had already testified, saying that it was manifestly a question of the weight of evidence. Plaintiff's counsel expressed his willingness that all the testimony should be brought out.

"The Court declined to allow more witnesses for the defendant to be called on that point, and the defendant's counsel excepted to the Judge's refusal.

"The Judge then charged the jury, and they were directed to bring in a sealed verdict in the morning.

"At the opening of the Court in the morning, the officer who had had charge of the jury informed the Judge that they had not agreed. Whereupon the Judge directed the jury to take their seats together again. Their foreman informed the Court that they had not been able to agree upon a verdict, the officer having kept them together from 6 until 10 o'clock of the previous evening, when they separated. Both parties were present, and their attorneys, but the defendant's counsel, who conducted the trial for him, was not present. The Judge stated that, in his opinion, it was extremely desirable that they should, if possible, come to an agreement, and stated to the attorneys present that if no objection was made by them, he should send the jury out again. No objection was in fact made, but the defendant's attorney stated to the Court that he was unwilling, in the absence of the defendant's counsel, to express either assent or dissent. Whereupon the Judge again directed the jury to retire and consider of their verdict; having first stated to them the substance of the legal propositions which he had stated to them the day before. Whereupon they again retired, and in about an hour returned with a verdict of $500 for the plaintiff."

The affidavits on which a new trial was moved for stated the fact as to the separation of the jury, and as to the proceedings had in Court when it opened the next morning. John Gibbons, one of said jurors, in one of said affidavits, deposed that, when the jury separated, his "mind was entirely made up that the plaintiff was entitled to no more than six cents damages;" that, on the opening of the Court next morning, "deponent" (Gibbons) "was still of opinion that six cents was as much as the plaintiff ought to receive, and was very unwilling to render any other verdict.

"That one of said jurors, named Bradley, thereupon stated that he was a personal friend of the defendant, and from what he knew of him he felt authorized to say that he would feel perfectly satisfied if a verdict was rendered against him for five hundred dollars, and would much prefer it to the expense and trouble of another trial; that, under the influence of these representations, and of the remarks of the Judge as to the expense and loss of

time, deponent was induced to assent to a rendering of a verdict for five hundred dollars, contrary to his own convictions; that deponent has since learned that such representations of said Bradley were entirely unauthorized and incorrect; that deponent was only induced to assent to the verdict by believing that such representations were true, and having learned on the same morning after the rendering of the verdict that he had been thus misled, returned to his former opinion that a verdict for more than six cents is more than the plaintiff is entitled to recover, and he accordingly desires that such verdict may be set aside."

The defendant made affidavit that Bradley had no authority, or pretense of authority, for making such statements. There was no pretense that the jurors, while separated, held any communication with any person in respect to the cause.

Five of the jurors made affidavit that they did not hear Bradley make any such remarks to Gibbons as the latter swore he did, and that Gibbons, before they separated, offered to consent to a verdict of $250 in favor of the plaintiff; that a majority of the jurors were in favor of a verdict for different sums varying from $1,000 to $5,000; and that, before they separated, ten of them had agreed upon $1,000 as the just and proper sum.

The juror, Joseph Bradley, made affidavit to the same facts, and denied that he made any such remarks as Gibbons deposed that he did, or "anything to that effect, or anything of the kind."

There was nothing in the affidavits tending to show any attempt on the part of any one to interfere with the jury, either while they were separated or during their deliberations, except in so far as the affidavit of Gibbons tended to show it.

E. C. Benedict, for appellant.

Solomon L. Hull, for respondent.

BY THE COURT—BOSWORTH, Ch. J. The appeal from the judgment brings under review only the exceptions taken during the progress of the trial. It does not raise the question whether the verdict is against evidence. That can only be considered at General Term on an appeal, from an order denying a motion for a new trial, taken under section 349 of the Code.

Dr. Rowland testified as an expert as to the effect produced on the plaintiff, by facts within his own knowledge. He spoke of the effect of injuries which he had seen, and in respect to which he was consulted at the time of their occurrence, and which he treated professionally. We think there was no error in his being allowed to answer the questions, "What is the effect of these injuries upon the plaintiff?" and "What effect did it have upon his mind?" or in receiving as evidence his answers to such questions.

The Court, in its discretion, may limit the party as to the number of witnesses to be examined as to what occurred, at a given time and place, between the parties. If he exercises his discretion to the actual prejudice of either party, his decision in that respect is not the subject of an exception which can be reviewed on an appeal from the judgment. In this case, when the plaintiff rested, but two witnesses had been examined as to what occurred in the defendant's store while the plaintiff was there. Neither of these two witnesses was present the whole time—one having been turned out soon after he entered it, and the other having got admission but a short time before the plaintiff was permitted to leave it.

The defendant examined six witnesses as to what the defendant did and said, and what the plaintiff said. The additional witnesses whom the plaintiff proposed to examine, were called "as to the same matters as already proved by the other witnesses." Nothing new, or additional to, or variant from that to which the six had testified, was offered to be proved. On the contrary, the purpose to give such evidence was disclaimed.

The practice of interposing to prevent the examination of an unnecessary number of witnesses called to testify to the same fact, has long prevailed at the Circuits. A useless repetition of witnesses cannot further the cause of justice, and is discountenanced by the law. (1 Cow. & Hill's Notes, 396.)

The exercise of that discretion is not the subject of an exception. If probable prejudice has resulted from it, in the trial of any cause, the remedy is a motion for a new trial, on a case.

The defendant, who complains, in this case, that he was not permitted to call more witnesses, examined twice as many as the plaintiff, in respect to the occurrences in defendant's store, and we

think he could not have been prejudiced by not being allowed to examine more who would testify as those did whom he had examined.

It was not error for the court, after the defendant had rested and the plaintiff had concluded his rebutting evidence, to refuse to allow the defendant to introduce additional witnesses, "as to what occurred in defendant's office, in corroboration of those who had already testified." That is a matter purely in the discretion of the Court. (*Shepard* v. *Potter*, 4 Hill, 202; 1 id., 300; 20 Wend., 225; 8 id., 376; 4 Cow., 450; 5 Hill, 286.)

These views dispose of all the questions arising upon the appeal from the judgment.

The questions yet to be considered arise upon the appeal from the order denying a motion made by the defendant for a new trial.

The notice of that motion was not served until after judgment had been perfected, and the judgment roll filed, and was not in fact made until several months subsequent to the taking of the appeal from the judgment.

By the settled practice, as it existed prior to the enactment of the Code, a motion for a new trial could not be made on a case, or on the ground of newly discovered evidence or of surprise, after judgment had been regularly perfected. (*Jackson* v. *Chace*, 15 J. R., 354; *Rapelye* v. *Prince*, 4 Hill, 125; *Roosevelt* v. *The Heirs of Fulton*, 7 Cow., 107.)

Chapter 128 of the act of 1832, (Laws of 1832, p. 188,) allowed a bill of exceptions, duly made and settled, in an action in the Supreme Court, to be argued, notwithstanding judgment had been perfected.

In the several Courts of Common Pleas, except that for the city and county of New York, a bill of exceptions taken in them was not argued in such Court, but was heard on a writ of error from the Supreme Court.

The practice under the Code is the same as before it was enacted.

"A motion for a new trial," on a case or exceptions, or otherwise, may be made under section 265 of the Code. When the Code, or the rules adopted under it, have not otherwise provided, the preëxisting practice must be pursued. (Code, § 469.)

To secure the right to be heard on "a motion for a new trial" on a case, a stay of proceedings must be procured, or an order obtained, that judgment, if entered, be entered not absolutely but as security merely. (*Benedict* v. *Caffee*, 3 Duer, 669.)

If the judgment entered be absolute and unconditional, the party loses his right to be heard on a case. If a bill of exceptions has been settled, the exceptions may be heard on an appeal from the judgment, taken under section 348 of the Code, although no motion was made at Special Term for a new trial.

The defendant is not in a condition, therefore, to move for a new trial on the ground that the verdict is against evidence, or that the damages are excessive, or for anything that occurred in open Court, to which no exception was taken.

The separation of the jury, without the consent of the Court, is not, *per se*, sufficient to entitle the defendant to a new trial.

That two of the jurors eluded the care of the constable, left the jury room, and one of them remained all night at a neighboring tavern, (*Smith* v. *Thompson*, 1 Cow., 221, n. *a*,) has been held not to be enough to set aside the verdict, if there be no suspicion of abuse. (*Vide* 3 Cow., 355; 4 id., 26, 38; 5 id., 283; 2 Wend., 52; 3 J. R., 252; 7 id., 32; 4 Barn. & Ald., 430.)

There is nothing shown justifying the inference that the jurors separated from any improper motive, or thought that they were thereby violating their duty. It is perhaps just to infer that the officer allowed them to separate, believing at the time that he was at liberty to do so, with the approbation of the court, on their failing to agree after being kept together as long as they were kept.

There is no pretense that, while separated, any one conversed with either of them in relation to this suit, the parties to it, the evidence given on the trial, or the witnesses.

There is no reason, therefore, to suspect that the plaintiff was prejudiced by the mere fact of their separation.

The defendant's attorney, while he declined to express any assent to the jury being sent out a second time, also declined to dissent. He "stated to the court that he was unwilling, in the absence of the defendant's counsel, to express either assent or dissent." This was said in response to the observation of the presiding Judge, "that if no objection was made by them," (the attorneys,) "he should send the jury out again."

This was clearly leaving it to the Judge, without objection, to take such course as in the exercise of his discretion he thought would promote justice between the parties.

We think, therefore, that a new trial should not be granted on account of the separation of the jury merely.

The affidavit of the juror, John Gibbons, that Mr. Bradley, another of the jurors, stated the matters detailed in the affidavit of the former, is denied by Bradley, and the latter is corroborated by the affidavits of five other jurors. No juror corroborates Mr. Gibbons, by stating that any such or any other communication was made by Bradley.

Under such circumstances we cannot, with any propriety, interfere with the verdict, on the assumption that any such communication was made, even if the fact that it was made could be shown by the affidavit of a juror, to impeach the verdict of the jury.

No part of the charge to the jury is contained in the case. We have no right to presume that it was prejudicial to the defendant, or adverse to the views of the law applicable to the case, on which his counsel insisted.

It is not a case in which the Court would be justified in interfering with the verdict, on the ground that the damages are excessive. Being of the opinion that the defendant was not prejudiced by not being allowed to examine more than twice as many witnesses as the plaintiff did, as to what occurred while the plaintiff was in the defendant's store, and that a new trial cannot be granted on the other grounds on which it is sought; the judgment and order appealed from must be affirmed, with costs.

Affirmed accordingly.

PLACIDE, Plaintiff and Appellant, *v.* BURTON, Respondent.

Where by the terms of an agreement between the plaintiff, (an actor,) and the defendant, (a theatrical manager,) it was agreed that the plaintiff should, between October 9th, 1854, and June 1st, 1855, perform as an actor for the defendant, during four terms of four weeks each, and that there should be an interval of four weeks between the terms, the commencement of each term to be appointed by the defendant, and notice thereof given to the plaintiff, and where they subsequently agreed that the plaintiff should not perform in January or February, 1855, and where, after that, the plaintiff commenced playing about the 9th of October, 1854, and before the end of the second week, it was agreed, at his request, that such first term of four weeks should be divided into periods of two weeks each, the plaintiff to discontinue playing at the end of said first two weeks, then leave, and return and play the other two weeks so as to complete the same on or about the 1st of January, 1855, and the plaintiff left at the end of the first two weeks, and did not again return or offer to return, and was not requested to return, *held*,

1. That the plaintiff was bound by the agreement, as modified, to return and play or offer to play said remaining two weeks, without any notice or request from the defendant so to do, and that the plaintiff's failure to do so, was a breach of the agreement on his part; and that he was liable to the defendant for the damages resulting therefrom.
2. That after such breach by the plaintiff of the agreement on his part, the defendant was under no obligation to employ the plaintiff further, and that no action would lie against the defendant for not having notified the plaintiff of the time of commencing other terms of four weeks each, and for not furnishing him employment for such terms, although the plaintiff might have been ready and willing to perform on being so notified.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 6th; decided, April 30th, 1859.

THIS is an appeal by Henry Placide, the plaintiff, from a judgment in favor of William E. Burton, the defendant, entered on the report of Henry Nicoll, Esq., as Referee.

In 1854, the defendant was the manager of a theatre in the city of New York, known as Burton's Theatre, and the plaintiff was an actor.

This action is brought to recover damages on the theory, that in July, 1854, it was agreed between the parties, that the

plaintiff should "take part or give his services in the performances exhibited in said theatre, whenever required by the said defendant so to do, during every other or alternate four weeks, from the commencement of the then next theatrical season" to the close of it; that is to say, between September 4th, 1854 and June 2d, 1855, for a specified compensation, which the defendant agreed to pay, viz., $150 weekly, for each of said alternate four weeks, and one-third of the proceeds or receipts of said theatre for one night at the end of each alternate fourth week for his benefit, of the value of $125. That the plaintiff has always been ready to perform when called upon, but that defendant has not complied with the agreement on his part, and that under such agreement he owes the plaintiff $1,950, with interest from the 4th of October, 1855, for which sum the complaint prays judgment.

The answer alleged the facts hereinafter mentioned, and claimed that the plaintiff had broken the agreement on his part and demanded damages as a counterclaim for such breach.

The facts, as in substance stated in the answer, and as found by the Referee, (with the exception that the answer states the agreement to have been, that the plaintiff should play, daily "every other or alternate four weeks" from the 9th of October, 1854, until the close of the season, about June 1st, 1855,) are, that prior to the opening of the defendant's theatre in October, 1854, it was agreed between the plaintiff and the defendant, "that the former, at and for a compensation in that behalf agreed upon between them, should, between the 9th day of October, 1854, and the close of the theatrical season at said theatre, on or about the 1st of June, 1855, perform as an actor at said defendant's theatre, nightly, during four terms or periods of four weeks each, the commencement of each of such terms or periods to be fixed and appointed by the said defendant, and notice thereof given to the plaintiff." That afterwards and prior to said 9th day of October, 1854, the defendant, at the request of the plaintiff, consented to a modification of said agreement, by which it was agreed, between them, that the plaintiff might go to the city of New Orleans, on or about the 1st of January, 1855, to perform as an actor at a theatre in said city, and that the plaintiff might for such purpose remain absent from the city of New

York until on or about the 1st of March, 1855. "That afterwards and in pursuance of the said agreement, the plaintiff, on or about the 9th day of October, 1854, commenced playing nightly at defendant's theatre, and which playing was to be continued for a term or period of four weeks, that the plaintiff played for and during the first two weeks of the said term or period; that on or about the expiration of the second week of the said term or period, the plaintiff proposed to the defendant that the said term or period which the said plaintiff was then playing, according to his said agreement, should be divided into periods of two weeks each; that at the expiration of said second week he should discontinue playing at said defendant's theatre, but should return and play the remaining two weeks of said term, so as to complete the same just prior to his departure for New Orleans, on or about the 1st day of January, 1855, that the defendant assented to the said proposition, and that thereupon the said plaintiff ceased playing at the defendant's theatre at the expiration of the second week of the said term; that the said plaintiff did not thereafter return and play at defendant's theatre the remaining two weeks of the said term or period, or ever after tender or offer to the defendant to play at said defendant's theatre during the aforesaid theatrical season."

That the said defendant, after the said 1st day of March, 1855, did not fix or appoint any other terms or periods of four weeks for the plaintiff's playing at defendant's theatre as aforesaid.

That the services of the plaintiff to the defendant in playing as an actor at defendant's theatre, were reasonably worth to defendant $100 per week, over and above the amount agreed by the defendant to be paid to the plaintiff for such services.

The Referee found as conclusions of law—

1. That by reason of the acceptance by the defendant of plaintiff's proposal to divide the first term or period of playing as aforesaid into terms of two weeks each, and for the plaintiff's return to play the remaining two weeks thereof as aforesaid, the original agreement was in that respect modified and the plaintiff became and was bound so to return and play for the said two weeks so agreed upon without further notice from defendant, and that by reason of his failure so to do, there has been a breach of the said original agreement as modified as aforesaid.

2. That the plaintiff having failed to perform said original agreement, so modified, cannot bring an action against the defendant for any breach of said agreement occurring after the breach thereof by the plaintiff as aforesaid, and that by the said breach thereof by the plaintiff, the defendant became and was absolved from all liability to the plaintiff, under said agreement, accruing after such breach, and had the right to treat the said agreement as at an end.

3. That by reason of plaintiff's failure to perform the remaining two weeks of the said first term or period as aforesaid, he is liable to the defendant in damages, and that the measure of such damages is the value to the said defendant of the plaintiff's services to him as an actor, over and above the compensation agreed to be paid to him.

As a final conclusion of law in the premises, the Referee directed judgment in favor of the defendant as against the plaintiff upon the causes of action in the complaint in this action alleged, and further judgment upon the counter-claims in said action for $200, and that the plaintiff pay to the defendant the costs of this action.

The action was commenced in October, 1855, and the Referee's report is dated April 19, 1858. The plaintiff duly excepted to each of the Referee's conclusions of law, and appealed to the General Term from the judgment entered on the report. Some portions of the testimony appear in the opinion of MONCRIEF, J.

N. Dane Ellingwood, for appellant.

I. The Referee, in his report, has found that the time of the commencement of each of the terms, was to be fixed and appointed by the defendant and notice thereof given to the plaintiff.

II. The Referee, however, erred in finding that a breach of the agreement to divide the first term into two terms of two weeks each, had been committed by the plaintiff; because, whether the theatrical season was divided into four or five terms is wholly immaterial; the same condition applies in the one case as well as in the other. The defendant had reserved the right to fix the time of the commencement of each term, and the plaintiff the right to be notified; without such notice was given, the plaintiff could commit no breach on his part.

III. The defendant himself did not pretend that the plaintiff had broken his agreement with him, upon the ground taken by

the Referee, but upon another ground, namely, that the plaintiff had refused to perform after the end of the first two weeks, and that he so desisted from performing, contrary to the wish of the defendant; denying, expressly, that there was any agreement to divide the first term into two terms of two weeks each.

IV. But admitting that there had been no express agreement that the defendant was at liberty to fix the time of the commencement of each term, and that the plaintiff was entitled to be notified, the nature of the employment was such that the right so claimed by the plaintiff and defendant respectively, would be implied. (*Graddon* v. *Price*, 2 Carr. & Payne, 610; Story on Contracts, § 974.)

V. The Referee also erred in finding that the plaintiff could not bring an action upon the original agreement after the said alleged breach by the plaintiff, and that the defendant, after the said alleged breach, had the right to treat such agreement as at an end.

If the defendant had such right, (which is, however, denied,) he did not avow it, but, to the contrary, permitted the plaintiff, who was always ready and willing to perform at any time during such theatrical season, to believe that the original agreement was still subsisting and in force. (Story on Contracts, § 977; Chitty on Contracts, p. 741; *Lawrence* v. *Dale*, 3 J. C. R., 23; *Ibid.*, 17 J. R., 437.)

H. A. Cram, for respondent.

I. The whole question in this case was a question of fact, which the Referee has found more favorably for the plaintiff than the evidence warranted. Placide, in fact, broke his engagement by leaving at the end of the two weeks; he did this without the permission of Burton.

The modified agreement, also, is stated more favorably for Placide than the evidence warrants. Under the modified agreement, as made out from the testimony of both plaintiff and defendant, there was a clear breach by plaintiff in not returning to complete the first term of four weeks. Plaintiff was bound to do this without further notice.

II. After this breach of the modified agreement found by the Referee, the plaintiff could maintain no action on the original agreement.

III. None of the various exceptions, either at the trial or to the findings of the Referee, were well taken.

MONCRIEF, J. There is no question that, on or about the 25th July, 1854, the defendant, being the manager of a theatre in the city of New York, entered into an agreement with the plaintiff for his services as a performer in such theatre from the 9th of October, 1854, to the 1st day of June, 1855, or until the time of the closing of the theatrical season of that year; the plaintiff, by the terms of such agreement, promising to play during four successive terms, of four weeks each, between the said 9th day of October and the time of the closing of such theatrical season, with an interval of four weeks intervening between each of said terms; the commencement of each of said terms to be fixed and appointed by the defendant, and notice thereof given to the plaintiff. Nor is there any dispute that this agreement was, subsequently, and about September, 1854, modified by the defendant, at the request of the plaintiff, whereby the plaintiff was permitted to go to New Orleans on or about the 1st of January, 1855, to be absent until on or about the 1st of March following. This, substantially, is alleged in the complaint, stated in the answer, and found by the Referee.

The plaintiff commenced his service under this agreement on the 9th of October, 1854, and performed for two weeks. At about the end of this two weeks he proposed to the defendant that said first term, which the plaintiff was then playing, should be divided into periods of two weeks each; that, at the expiration of said second week, he should discontinue playing at said theatre, but should return and play the remaining two weeks of said term, so as to complete the same just prior to his departure for New Orleans on or about the 1st day of January, 1855; and the defendant assented thereto.

This finding of the Referee is sustained, and is substantially, in respect to the terms of the modification, as testified to by the plaintiff himself.

There was no other or different agreement or understanding between the parties with reference to the performance by the plaintiff of the last two weeks of the first term, under the original agreement.

The plaintiff never tendered his services, or performed further or other than said two weeks under his agreement, and now claims that he was entitled to notice from the defendant of the time when he should commence the performance thereof. No such notice was given. The only question discussed upon the argument, and, it would seem, from the conclusions of fact and of law found by the Referee, that the only question in the case is, whether or not the plaintiff was entitled to such notice, or was bound to tender his services at such reasonable time as to be enabled to complete the first term of four weeks, just prior to the 1st of January, 1855, according to the contract as modified in October, 1854.

The plaintiff had fixed and determined for himself, by his own proposition and the defendant's acceptance of it, the time of the commencement of the last two weeks of his first term. The defendant had given notice to the plaintiff of the commencement of the first term, and the plaintiff began his performance of it, but, before completion, sought and obtained leave to make a different arrangement. He fixed, by that arrangement, the period for commencing the performance of this unfinished term, as he states in his evidence, by proposing to "divide that four weeks into engagements of two weeks each; that is, to perform two weeks, then go into the country and stay two weeks, and then to return and play two weeks." Again, he says: "I propose to divide this four weeks' engagement, play two weeks of it now, and return time enough before the 1st of January to play two weeks, then play those two weeks," &c. This latter statement does not materially vary from the fact as found by the Referee; and the first statement has a specified time assigned. According to that, after an interval of two weeks he was to return and play: by the latter, it was left optional to the convenience of the plaintiff at what time he should return, so long as he returned time enough to play the two weeks before the 1st of January. The plaintiff was bound to have returned and played, or tendered his services to play, the unfinished portion of his term, without notice from the defendant; and not having so done, he not only has no claim upon the defendant in respect to that two weeks, but he thereby committed a breach of his agreement and became liable to the defendant for his damages sustained thereby.

The agreement had been reconstructed at the request of the plaintiff. At first, he was bound to have performed four weeks commencing in October, and other four weeks in each of the months of December, February, March and May. It was modified in September, by the plaintiff obtaining permission to be absent eight weeks from about January 1st to March 1st, 1855; and again changed so that, as it stood at the completion of two weeks' service, the plaintiff had excepted the December and February terms or periods of service, and left unfinished half of the first term. This modification of the original contract would seem, necessarily, to require from the plaintiff an offer to perform, and to relieve the defendant from giving notice of a time when his services should commence. The plaintiff had received notice of the commencement of the first term, and was bound to complete it without further notice, unless he expressly stipulated to the contrary; and there is no such provision in the agreement of October, 1854, but, on the contrary, that, substantially, fixes the middle of December as the time when the plaintiff would return and complete it. The plaintiff having broken his agreement in not returning and completing the first term, and never afterwards offering or tendering his services to the defendant in fulfillment thereof, the defendant had a right to treat the contract as broken by the plaintiff, and was not bound to employ him in April or June, and is not liable by reason of not having notified him to perform a term in each of those months.

The damages found by the Referee were awarded as compensation to the defendant for the non-performance by the plaintiff for the residue of the first term; and his finding is sustained by the evidence.

After an examination of the whole case, I am of opinion that the conclusions of fact and of law, as found by the Referee, are correct, and should be sustained. The judgment, therefore, must be affirmed, with costs.

BOSWORTH, Ch. J., and HOFFMAN, J., concurred in the conclusions stated in the opinion of MONCRIEF, J.

Judgment affirmed.

STUDWELL, Plaintiff and Appellant, *v.* TERRETT, Respondent.

One Jane E. Jones, by a written order dated May 26, 1856, and directed to the defendant, requested him to pay to the plaintiff or order defendant's note at three months for $250, "whenever I (said Jones) have put on the third tier of beams upon the five brick houses now building by me, * * to apply on the third payment as per contract for building said houses between us, dated March 27th, 1856." By the contract of March 27th, Jones agreed to build and complete for the defendant five buildings, in a manner and by a time specified, and the defendant agreed to advance to Jones a building loan of $3,500 as the houses progressed, as follows, viz.: (1st,) $500 cash when the first tier of beams was on and the walls up all around; (2d,) $500 cash when the second tier of beams was on and the walls up all around; (3d,) Three other payments, in notes or acceptances of $500 each, not to fall due before the browning of the whole five houses was on and floors laid. The defendant accepted said order of May 26th, 1856, by a writing on its face reading thus: "Accepted May 29th, 1856; G. R. TERRETT," and delivered it thus accepted to the plaintiff, who furnished lumber to be used and which was used in said five buildings. They were so far proceeded with that the side walls were raised up to the third tier of beams, and the third tier was put on, but the front walls were never raised higher than the sills to the basement windows. *Held,*

1. That the defendant was not liable by reason of his said acceptance, to give a note to the plaintiff for $250, until after the buildings had been so far completed in the manner specified in the contract of March 27th; that the first and second payments had become due, and in addition to that the third tier of beams had been put on, in the further prosecution of the work as usual and customary in such cases.
2. The contract of March 27th, 1856, is, by force of the reference made to it in the order of May 26th, 1856, incorporated into the latter in such sense that its provisions are to determine when the payment of $250, by note, is to be made.
3. The order of May 26th, 1856, and its acceptance, do not, together, constitute a contract binding the defendant unconditionally to give his note for $250, to any person who may furnish materials for the buildings, on the security of such contract, irrespective of the stage reached in the progress of the work of erecting the buildings at the time such a note may be demanded.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)
Heard, April 7; decided, April 30th, 1859.

THIS is an appeal by Augustus Studwell, (the plaintiff,) from a judgment against him in favor of Gilbert R. Terrett, (the defend-

ant.) entered on the report of Hamilton W. Robinson, Esq., as Referee.

The summons, by the service of which the action was commenced, was served January 13th; the complaint February 12th, and the answer March 12th, 1857.

The defendant is sued upon his written acceptance of an order, which, with the said acceptance, reads thus, viz.:

"BROOKLYN, May 26th, 1856.

"TO GILBERT R. TERRETT, Esq.:

"Sir,—Please to pay A. Studwell, Esq., or order, your note at three months, for two hundred and fifty dollars, whenever I have put on the third tier of beams upon the five brick houses now building by me on Putnam avenue, eighty feet west of Bedford avenue, in this city, to apply on the third payment as per contract for building said houses between us, dated March 27th, 1856, and oblige,

"Yours, &c.,

"JANE E. JONES."

"Accepted May 26th, 1856. G. R. TERRETT."

By the said "contract for building said houses, * * dated March 27th, 1856," said Jane E. Jones (*inter alia*) covenanted to and with said Gilbert R. Terrett, "to build" on certain lots therein described, "situate on and fronting on Putnam avenue, five three story brick houses, with high basements," &c., to be finished in every respect like a certain house on Lafayette avenue designated as a model house; and to complete them on or before the 1st of September, 1856; and Terrett covenanted to furnish said Jones a building loan of $3,500, "to be advanced as the said houses progress," as follows: "First payment, when the first tier beams is on, and the walls up all around, five hundred dollars in money; second payment, when the second tier beams is on, and the walls up all around, five hundred dollars in money; three other payments, to be made by advancing notes or acceptances of five hundred dollars each, drawn by the party of the first part, (said Terrett,) not to fall due before the browning of all the said five houses is on, and floors laid." The sixth payment, of $1,000, was to be made when the houses were all finished ready for occupancy.

The plaintiff furnished lumber and materials to said Jones in erecting said buildings, and gave evidence tending to show that he furnished them on the security of the defendant's acceptance of said order of May 26th, 1856. He also gave evidence of having demanded from the defendant, his note for $250 before this suit was commenced, and claimed that the evidence showed that, at the time such demand was made, the third tier of beams had been put on said five houses, within the meaning of the provision in that behalf contained in the said contract of March 27th, 1856.

The Referee found, among other things—

"That the side-walls to the houses, mentioned in the order, were built up to the third tier of beams, and the third tier of beams was put on before this suit was brought, and before the refusal of the defendant to give the note.

"That before this suit was brought defendant refused to give the note.

"That the contractor never erected the front walls higher than the sills to the basement windows, and never became entitled to the first or second payment, or advance.

"That the defendant had made payments on account of the first and second installments.

"The Referee found, as matter of law, that there was a valid agreement by the defendant to give the note named in said order, upon the condition therein mentioned.

"That this agreement referred to and adopted the building contract, between defendant and Jane E. Jones, and that whatever of obligation existed on the part of the defendant to give the note, arose out of his obligation to pay or advance money to Mrs. Jones, from time to time, as she progressed with the erection of the buildings, in the manner therein specified.

"That this agreement to pay $250, in a note, when the 'third tier of beams was on,' which was 'to apply on the third payment,' did not become operative, unless all the work which entitled the contractor to the first and second payments was completed.

"That it became a condition precedent to the giving the note, that 'the walls should be erected all around,' at least to the height of the second tier of beams,

"That this condition precedent was not performed, and that by reason thereof no right of action accrued to the plaintiff;" and that the complaint should be dismissed, with costs.

The plaintiff duly excepted to the following findings of the Referee, as matter of law:

"1st. That the agreement, by defendant to give the note, referred to and adopted the building contract, between the defendant and Jane E. Jones, and that whatever of obligation existed on the part of the defendant to give the note, arose out of his obligation to pay or advance money to Mrs. Jones, from time to time, as she progressed with the erection of the buildings in the manner therein specified.

"2d. That this agreement to pay $250, in a note, when the 'third tier of beams was on,' which was to apply on the 'third payment,' did not become operative unless all the work, which entitled the contractor to the first and second payments, was completed.

"3d. That the condition precedent to the giving the note, required the erection of the walls 'all around;' at least to the height of the second tier of beams.

4th. That this condition precedent was not performed, and that, by reason thereof, no right of action accrued to the plaintiff, and that the complaint should be dismissed with costs."

The Referee wrote an opinion containing the reasons for his decision.

Judgment having been entered upon the report, the plaintiff appealed from it to the General Term.

George W. Mead, for appellant.

I. The questions for review in this case will be seen, mainly in the findings of the Referee, and the exceptions thereto.

Our difference with the Referee is, mainly, upon his conclusions of law, contained in our exceptions.

This difference will best be made to appear, in the first instance, by a statement of the conclusions of law, that, we think, are inevitable, from the facts found.

1st. We say, that the written order and acceptance, the execution of which is admitted, in themselves, constitute a valid promise and agreement in writing, with the consideration expressed,

by the defendant Terrett to and with the plaintiff Studwell, to pay to the latter the note mentioned in the order, upon the condition therein mentioned. That this instrument contains an independent, original agreement, between plaintiff and defendant, to which the statute of frauds has no application.

2d. We say, that if the statute of frauds had any application to it, it fully meets the requirement of the statute.

3d. We say, in the third place, that, if this instrument did not, alone, constitute an agreement by defendant, to give the note to plaintiff; still the only proper conclusion of law, from the facts found, as to the agreement to give the note, was that for the consideration contained on the face of the order, and in consideration of the delivery by plaintiff, to Jane E. Jones, of the lumber, the defendant agreed, to and with the plaintiff, to pay to him the note, whenever Jane E. Jones had put on the third tier of beams upon the houses. That here was an independent, original contract between them, unaffected by the statute of frauds, having no other limitation or condition than the one named in the order.

4th. That the only condition precedent to the giving of the note, was that named in the acceptance, to wit: putting on the third tier of beams, upon the houses named; and this having been done, and the defendant having refused to give the note, the plaintiff was entitled to judgment for the amount of it in money, with interest and costs.

II. 1st, Therefore, we say that the Referee was right in finding, as conclusion of law, that "there was a valid agreement by the defendant to give the note named in said order, upon the condition therein named," but that he was wrong in finding "that," (by a proper construction of this order, of course,) this agreement referred to and adopted the building contract, between defendant and Jane E. Jones, and that whatever of obligation existed on the part of the defendant to give the note, arose out of his obligation to pay or advance money to Mrs. Jones, from time to time, as she progressed with the erection of the buildings, in the manner therein specified. That this agreement to pay $250, in a note, when the "third tier of beams was on," which was "to apply on the third payment," did not become operative unless all the work which entitled the contractor to the first and second payments, was completed.

That it became the condition precedent to the giving the note, that "the walls should be erected all around," at least to the height of the second tier of beams.

That this condition precedent was not performed, and that by reason thereof no right of action accrued to the plaintiff.

2d. The theory upon which the Referee tried this case may be thus stated, to wit: That the statute of frauds was an insuperable barrier to the establishment of any agreement, except by considering it as "a mere alteration of the mode in which a subsisting debt or obligation to pay or advance money was to be discharged," so as to bring the case within the principle of the authorities cited by him.

It being competent (as he says) for the parties to agree, that upon a valid consideration, passing from the plaintiff to Mrs. Jones, any moneys, which, by virtue of any subsisting contract, were to become payable to her from the defendant, should be paid to the plaintiff instead.

3d. The findings of law excepted to are plainly consequent upon this theory.

4th. We are confident the Court will regard the theory and the findings of law referred to, as wholly erroneous.

The judgment should be reversed.

Joseph Neilson, for respondent.

I. The order was conditional, its payment depending upon the performance of the contract by Jones. Jones did not perform, but abandoned the contract.

II. No error of law was committed by the Referee, and the judgment should be affirmed. (See opinion of the Referee; also the case of *Van Wagner* v. *Terrett*, 27 Barb. S. C. R., 181.)

BY THE COURT—BOSWORTH, Ch. J. Whether the judgment appealed from be erroneous, depends upon the true construction of the contract made by the defendant, (dated May 29th, 1856.)

It is not an agreement to pay to the plaintiff $250 in money on any day named, or which can be ascertained by the contract itself; but it is an agreement to make and deliver to the plaintiff the defendant's promissory note for $250, "at three months."

When and on what contingency it was to be so made and delivered, are the material questions.

If the words, "to apply on the third payment," were transposed and inserted after the figures 1856, the agreement would express clearly the idea, which, as the defendant contends, it is apparent from a careful consideration of its terms, when viewed in the light of the facts then existing and known to all the parties, the parties to it meant to express. With that transposition made, it would read thus:

"BROOKLYN, May 26th, 1856.

"To GILBERT R. TERRET, Esq.:

"Accepted May 26th, 1856. G. R. TERRETT."

"Sir—Please to pay to A. Studwell, Esq., or order, your note at three months for two hundred and fifty dollars, whenever I have put on the third tier of beams upon the five brick houses now building by me on Putnam avenue, 80 feet west of Bedford avenue, in this city, as per contract for building said houses between us, dated March 27, 1856, to apply on the third payment, and oblige,

"Yours, &c.,

"JANE E. JONES."

If, by the terms of the contract of March 27, 1856, Jones might be entitled to any payment whenever she had put on the third tier of beams, "to be made by the advancing notes or acceptances of five hundred dollars each," none could be required to be given, which would fall due "before the browning of all the said five houses are on, and floors laid."

A note made when the third tier of beams was on, and dated at that date, and payable three months thereafter, might fall due sooner than the time fixed for the maturity of the notes, to be advanced for the third, fourth and fifth payments.

"To apply on the third payment, as per contract," &c., is an expression difficult to be understood, if the words "as per contract," &c., are to be deemed to have been introduced, merely to show the manner of applying the $250 on the third payment.

But if the words "as per contract," &c., be regarded as introduced to render somewhat definite the time at which, and the contingency on which, the note was to be given to the plaintiff, that expression is more intelligible. For, although the putting on the third tier of beams is not specified as a stage in the process of erection, or even named in terms, yet it would be quite

clear that it could not happen, within the meaning of the contract, until after the first and second tier of beams were on, "and the walls up all around." All that must be done to make the first two payments demandable. And all that having been done, and the work having been subsequently carried forward, in the usual mode of building, it might be within the parties' meaning of the contract, that when such further progress had been made as to have contributed $500 further security, a note of $500 was to be advanced, which would mature not sooner than the time specified for the maturity of the notes to be given for the third, fourth and fifth payments.

We think it a just conclusion, therefore, that the contract between the plaintiff and the defendant, by its fair and reasonable construction, does not import or express any undertaking by the defendant to give his note for $250 to the plaintiff, until after the buildings had been so far completed, in the manner specified in the contract, that the first and second payments had become due, and, in addition to that, the third tier of beams had been put on in the further prosecution of the work, in the manner usual and accustomed in such cases.

The plaintiff, so far as the question of securing the defendant's responsibility was concerned, took the risk of Jones, so prosecuting the work as to put on the first and second tier of beams with "the walls up all around," and of progressing so much further, as is usual and customary in such cases, as to put on the third tier of beams, and the defendant took the risk, when all that was done, of finding in Jones' contract, and in what, in that event, would have been done under it, security for and indemnity against such an advance.

This view of the contract would make it substantially such a contract as formed the subject of the action in *Van Wagner* v. *Terrett*. (27 Barb. S. C. R., 181.)

We think this view accords with the intention of these parties, as shown by the terms of their contract, when viewed in the light of the facts existing and known to them when it was made. And that, inasmuch as Jones never so far completed her contract that the first and second payments to be made by the defendant under it became due, it follows that Jones has "not put on the third tier of beams upon the five brick houses," spe-

cified in her contract of the 27th of March, 1856, within the meaning of that contract, nor within the meaning of the contract between the plaintiff and defendant, on which this action is brought.

This view of the rights of these parties, disposes of every question raised by the present appeal, and the judgment appealed from must be affirmed, with costs.

Judgment affirmed.

BERNHARD *et al*, Plaintiffs and Appellants, *v.* BRUNNER *et al*, Defendants and Respondents.

1. In an action by the payees of a check against the drawers, the defendants may show the transaction in which it originated; that its delivery was not absolute but conditional, and that according to such condition it was the plaintiffs' duty to return it to the defendants, and that they had refused, before suit brought, to do so.
2. When there is conflicting evidence in respect to the allegations of fact stated in an answer as a defense, it is the duty of the Judge to submit the evidence to the jury, and consequently an exception to his refusal to charge that it established the facts, as either party claimed them to be, is manifestly untenable.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)
Heard, April 7; decided, April 30, 1859.

THIS is an appeal by the plaintiffs from a judgment against them, entered on a verdict rendered at a trial before Mr. Justice WOODRUFF and a jury, on the 21st of June, 1858.

Isidor Bernhard and Seigel Bernhard, composing the firm of Isidor Bernhard & Son, are the plaintiffs, and William Brunner, Samuel Brunner and Jacob Brunner, composing the firm of William Brunner & Co., are the defendants. The action is upon a check in these words, viz.:

"No. 8874. NEW YORK, Sept. 14, 1857.

"*Bank of the State of New York:*

"Pay to the order of Messrs. Isidor Bernhard & Son, twenty-four hundred and thirty-five $\frac{40}{100}$ dollars.

"$2,435$\frac{40}{100}$. WILLIAM BRUNNER & Co."

The defense set up in the answer, and attempted to be proved at the trial is, that the check was a memorandum check; that the defendants applied to the plaintiffs, on the 7th of September, 1857, to borrow money; the latter said they had none they could lend, but had a note for $2,435.50, made by Coffin & Haydock, having about 18 days to run, which the plaintiffs had no doubt, as they said, the defendants could get discounted at their Bank as the note was so near its maturity, and the makers were perfectly responsible; that the defendants took the note to see if they could get it discounted, the next day being discount day, and gave the check as a memorandum, and the agreement was that the note was to be returned if the bank would not discount it, and the check given up. That on the 8th the bank refused to discount the note, on the ground that the makers had failed, whereupon the defendants returned it, and the plaintiffs refused to accept it, or surrender the check in suit.

The defendants gave evidence tending to prove the truth of the facts stated in their answer. The plaintiffs, on their part, gave evidence tending to show a sale of the note, or an exchange of it for the defendants' check.

The plaintiffs objected and excepted to the admission of evidence to prove the defense stated in the answer, on the ground that the check was, in terms and legal effect, payable absolutely, and could not be shown by parol to be payable on a contingency.

The evidence also disclosed, that on the same 7th of September, the defendants received from the plaintiffs a note for $4,500, made by Van Wyck, Townsend & Warren, and gave their check to the plaintiffs for the same amount, dated subsequently, but a few days before such note matured; that the defendants procured such note to be discounted on the 8th, and paid their check on the day of its date. The plaintiffs gave evidence tending to show that the transfer of both of said notes was a single transaction, and was in pursuance of one contract, and the defendants gave evidence tending to show that the transactions were separate, but that the one, in its substance, was the same as the other.

The plaintiffs requested the Court to charge,

1. That the evidence established a sale of the Coffin & Haydock note, and that the plaintiffs are entitled to recover.

2. That the contract being for the two notes, taken for the two checks, the defendants cannot rescind without returning both notes, they cannot divide the transaction, keeping one note and returning the other. The Judge refused to charge according to either request, and the plaintiffs excepted.

The Judge charged, (*inter alia,*) thus: "The question is, therefore, what was the real transaction between the parties, as understood by them, and agreed to at the time? If the note was taken, and the check was given, as a purchase; or if the note was taken as an exchange of the check for the note—the note to be used by the defendants as their own, the defendants are liable; but if the note was taken on the understanding, that the defendants could get it discounted at their bank, and should try to get it discounted there, and the check was given only as a security to the plaintiffs in that event, then, the defendants are not liable, as they returned the note on the discount being refused. (To this last portion of the Judge's charge, the plaintiffs' counsel excepted.)

The jury rendered a verdict in favor of the defendants. The plaintiffs moved, on a case, for a new trial, and the motion was denied. From the order denying it, and from the judgment entered on the verdict the plaintiffs appealed to the General Term.

James W. Gerard, for the appellants,

Insisted that the evidence entitled the plaintiffs to the instructions which they requested the Court to give to the jury; that the exceptions to the refusal to charge as requested were, therefore, well taken; and contended that, a check on a bank, absolute and unconditional on its face, cannot be shown, by parol, to be payable only on a contingency, which would destroy, qualify or limit its legal effect; or only out of a particular fund, and cited Edwards on Prom. Notes, pp. 147, 148; Chitty, 162, ed. of 1836; *Johnson* v. *Titus et al.*, (2 Hill, 606,) *Thompson* v. *Ketcham*, (8 John. R., 192,) *Barnum* v. *Barnum*. (8 Conn., 409.)

S. Sanxay, for the respondents.

BY THE COURT—HOFFMAN, J. The consideration of a check or note may be inquired into: that nothing was given for it, or what was given for it, is open to proof. This involves the whole

examination of the facts and circumstances attending the transaction, so far as the point of consideration is concerned. (Chitty on Bills, 69, and notes; Edwards on Bills, 311, *et seq.*)

If, then, the allegation is, that one security or evidence of debt was given for another of a similar nature, the inquiry is open; was there a mutual, unconditional sale or exchange of one for the other; or was there any other condition or purpose for which the interchange was made?

We think it clear that the Judge was right in admitting testimony to show on what agreement the check was given, upon the delivery of the note of Coffin & Haydock. The testimony was directed to the original consideration of the check.

The Judge would have erred, in our opinion, had he taken the question of the fact of a sale or no sale of the note from the jury, or expressly directed them to find a sale, as he was requested to do. There was evidence enough to go to the jury upon this question—indeed, evidence enough to sustain the conclusion they arrived at.

We consider, also, that his refusal to charge, as requested, that they could not rescind the contract as to this check and note without doing so as to the other, a proper refusal. There was nothing in the case, so connecting the one with the other, as to make an indivisible contract.

The charge of the Court was, in our opinion, correct. The inquiry upon the testimony was legally open, whether the note was sold and the check given as its price—the defendants taking the note to use it as their own absolutely; or whether the note was delivered for the special purpose of trying to get it discounted, and the check given as a security to the plaintiffs in case the defendants succeeded in getting the money upon it, and to enable them to have the price a few days earlier than the note matured.

The case, then, went to the jury upon the point of the true original consideration of the check. There was evidence requiring the Judge to submit this question to them. They have found that the delivery was made for the special purpose mentioned. Their verdict is warranted by the testimony; and we conclude that no error was committed by the Court or jury.

The judgment must be affirmed, with costs.

Judgment accordingly.

DAVENPORT, Plaintiff and Respondent, *v.* GILBERT, Appellant.

1. A notice of protest, dated on the day a note matures, describing it by the name of the maker, and its amount, and as indorsed by the defendant, and stating that such note is protested for non-payment, and that the holders look to him for payment, is sufficient in form, without stating further descriptive particulars.
2. Although the defendant was, at the time of receiving such notice, the indorser of another note in all respects like it, which was outstanding and unpaid, except that it was payable three instead of six months after its date; still the notice is not insufficient by reason of its uncertainty, it being shown that a suit was pending on the note first due when the second note was protested, and that the defendant had answered in such suit before the note in question matured.
3. It is not sufficient, to charge an indorser, to leave notice of protest at a building in a city corresponding in number with that written under his indorsement, without proving that such building was, at the time, the indorser's place of residence or business, and was left with some proper person therein.
4. Nor is it sufficient that a notice was sent to the indorser's office, without proving that it was there delivered to him, or to some person in charge thereof, or that no such delivery could be made.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 8; decided, April 30, 1859.

THIS is an appeal by Jasper W. Gilbert, the defendant, from a judgment in favor of Samuel W. Davenport, the plaintiff, entered on a verdict rendered on a trial had before Chief Justice OAKLEY and a jury, on the 10th of April, 1856.

The suit is against the defendant, as payee and indorser of a note reading thus:

"$524\frac{63}{100}$. NEW YORK, January 1st, 1854.

"Six months after date I promise to pay to the order of J. W. Gilbert five hundred and twenty-four $\frac{63}{100}$ dollars, at the 7th Ward Bank, for value received, with interest.

"P. J. THOMAS,

"No. 222 West 30th street.

"Endorsed J. W. GILBERT,

"64 Trinity Buildings."

The complaint is in the usual form of one by indorsee against the first indorser. The defendant's answer denies that due notice of non-payment or presentment of the note was given to him, and avers that no such notice was ever received by or sent to him. The pleadings are not verified.

At the trial, the note and indorsement thereon, in the form above stated, were read in evidence.

The Notary testified that he presented the note for payment at the Seventh Ward Bank, on the 3d of July, 1854; that payment was refused and the note protested; that on the 5th he left a notice thereof, directed to the defendant, "at 64 Trinity Buildings." "There was another notice of the non-payment of this note sent to J. W. Gilbert's office, at 22 William street. This notice was marked on the outside, 22 William street, and with J. W. Gilbert's address on the back. These two notices were both dated July 3d, 1854, and described the said note by the amount." That the notice sent to Trinity Buildings, was similar to the one sent to 22 William street, which was read in evidence, viz.:

"NEW YORK, July 3, 1854.

"Please to take notice that a note made by P. J. Thomas, for $524\frac{83}{100}$, indorsed by you, is protested for non-payment, and that the holders look to you for payment.

"HARMAN C. WESTERVELT,

"Notary Public."

The plaintiff having rested, the defendant proved that at the time such notice was sent, he was indorser upon another note, in all respects like the one in suit, except that it was payable three months after its date, and that such other note was outstanding and unpaid.

The plaintiff then proved, against the objection and exception of the defendant, that a suit was pending on such other note at the time the note in suit became due, in which suit the defendant had put in answer on the 8th of May, 1854.

The evidence being closed, the defendant moved to dismiss the complaint on the ground that the plaintiff had failed to prove a sufficient notice, because, (1), "no legal service of the notice had

been proved; (2), "the notice did not sufficiently describe the note, and might refer to either one of the notes aforesaid."

The Court overruled the motion. The defendant was permitted to go to the jury upon the question of fact whether he was misled by the form of the notice, but he declined to do so. The Judge then decided that the plaintiff was entitled to recover, and so instructed the jury. The defendant excepted. The jury found a verdict for the plaintiff for the amount of the note and interest, and from the judgment entered thereon, the present appeal is taken.

J. W. Gilbert, in person.

I. The service of the notice of dishonor was insufficient. The notice must be delivered to the indorser, or left at his place of residence or business with a proper person, or left at such place when there is no person present. (Code, § 409; *U. S. Bank* v. *Hatch*, 1 McLean, 90; *Rives* v. *Parmly*, 18 Ala., 256; *Coster* v. *Thomason*, id., 717; *Saul* v. *Brand*, 1 La. An. R., 95; *Lord* v. *Appleton*, 3 Shep., 270; *Bradley* v. *Davis*, 13 id., 45.)

II. The notice was insufficient on its face. It did not inform the indorser which note was intended. (*Cook* v. *Litchfield*, 5 Sand., 330, 332; *S. C.*, Ct. of Appeals, Dec., 1853; Parsons' Mercantile Law, 112; 5 Seld., 279.)

III. The fact that an action was pending on the note which first matured, was immaterial. The notice given referred as well to the one note as the other, and both were still unpaid. This notice would have been, in every respect true, if the six months' note had never been presented for payment.

H. G. DeForest, for respondent.

I. The notice of non-payment was clearly sufficient. A notice exactly like it was passed upon in the recent case of *Young* v. *Lee*. (2 Kern., 552, and cases cited; see, also, *Stackman* v. *Pan*, 11 M. & W., 809; *Beals* v. *Peck*, 12 Barb., 245; *Cook* v. *Litchfield*, 2 Bosw., 137.)

II. The evidence offered of the existence of another note of the same amount did not deprive the notice of its legal sufficiency.

Evidence of this nature at most only tended to show that the defendant might have been misled.

The testimony that a suit had been commenced on the other note against Gilbert, and that he answered in that action before the maturity of this note was relevant to show the contrary.

III. The defendant declined going to the jury upon the question whether he was misled, and the Court properly directed a verdict for the plaintiff.

MONCRIEF, J. Upon the hearing of this appeal, the defendant argued the following propositions:

1. The service of the notice of dishonor was insufficient.

2. The notice was insufficient on its face: it did not inform the indorser which note was intended.

3. The fact that an action was pending on the note which first matured was immaterial.

The first and last points were not much pressed upon the argument—the question mainly discussed being that presented by the second point. The first point, however, was distinctly made upon the trial and now forms part of the case, and must be considered in disposing of the appeal.

Notice of the non-payment of the note was necessary in order to charge the defendant as indorser. He was entitled to such a notice as would inform him of the protest of the note in suit. In determining whether the notice was sufficient, the circumstances of the case—the fact that he had indorsed but two such notes; that one was past due, and either had or had not been protested; that a suit on that note was actually being litigated by him; that one was payable at three, and the other at six months after date; that the date of the present notice is the day of the maturity of the last note; all of which was within the knowledge of the defendant—may be taken into consideration with a view to show that the defendant could not possibly have been misled or mistaken in regard to the meaning of the notice and the identity of the note. There could be no uncertainty as to which of the two notes was protested on the 3d of July, 1854. One had been due for three months, and a suit thereon had been pending against the defendant for nearly the same period. The other note (the note in controversy) became due on that day. A similar notice was held good in *Youngs* v. *Lee*. (2 Kern., 552; see, also, 5 Seld., 286; 23 Wend., 626.)

It was proper to admit evidence of the fact of the suit pending upon the first note, and the answer of the defendant therein to meet the suggestion that he was or might be misled by the notice in the present action—a suggestion based on the fact that the defendant had indorsed two notes of the same date and amount. Whether the defendant could or could not have been misled was a question of fact; and he declined to submit it to the jury.

The Court did not err in its ruling with regard to the second or third point.

As to the service of the notice, the most liberal view that the evidence will admit on behalf of the plaintiff is, that the Notary left one notice at 64 Trinity Buildings, and sent another to the defendant's office at 22 William street. The address marked on the note, affixed to the indorsement of the defendant, might, under certain circumstances, authorize a notice to be served upon some person at that place, or left there; but that would not be a proper place to leave it, if the Notary knew it had ceased to be the defendant's place of business, unless his new place of business was not known or could not be ascertained upon inquiry. It is the duty of the Notary, or of the holder, to make diligent search and inquiry for the maker, his place of business or residence, in order to present the note and to protest it for non-payment; and I can see no good reason why the same diligence should not be required and exercised as against the party alone to be made liable by such diligence. The proof of service should show either that the notice was served personally, or, if the indorser could not be found, that it was left at his resi dence or place of business, or furnish some sufficient reason for other service being made. It is a just inference from the evidence that the Notary knew the place of business of the defendant. The evidence did not show what place 64 Trinity Buildings was, what connection, if any, the defendant had with it, to whom, if to any person, the notice was delivered, or the relation such person had to the defendant, or what disposition was made of the notice at that place. The other notice was sent to the office of the defendant at 22 William street. It does not appear by whom or by what means this was sent, nor to whom it was delivered, nor that it actually reached the building having that number. This, in my opinion, is not sufficient. Notice should be brought

home to the defendant either by personal service or by leaving the same with some person at his place of business or residence, or some reasonable excuse should be given for the omission. (See 6 Duer, 492; 16 N. Y. R., 237; 11 Johns., 232; 3 Seld., 481; 24 Wend., 230.)

The act of 1857, (ch. 416, p. 839,) seems to sustain this view, as its object is to relieve holders of notes, &c., from embarrassment as to the manner of serving notice in order to charge the indorsers. The act, however, in express terms, excludes from its operation all notes made prior to its passage, and, of course, does not affect the note in suit.

The service of the notice not being sufficiently proved, the judgment must be reversed solely on this ground, and a new trial ordered, with costs to abide the event.

BOSWORTH, Ch. J., and HOFFMAN, J., concurred.

Judgment reversed, and new trial granted, with costs to abide the event.

GEORGE WADE, Executor, &c., of George Rusher, *v.* JOHN B. RUSHER, DAVID T. EASTON and others.

1. Where suit is brought by one of two partners against the other, to obtain an accounting and payment of a balance justly due from the defendant to the plaintiff, and to set aside as fraudulent a release from liability as such partner executed by the plaintiff to the defendant; a third person who has fraudulently and without consideration obtained from the defendant portions of the partnership property may also be made a party, in order to subject the property so held by him to the payment of any balance due from the defendant to the plaintiff.
2. The cause of action is single, viz.: the right to an accounting and an application of the partnership property to the payment of the sum due from the defendant.
3. The partner to whom a balance is due has a lien upon the partnership property, and upon other property into which it may have been converted by the debtor partner; not only as against him, but as against all assignees of it who are not *bona fide* purchasers of it for value.

4. Although portions of such property may have come to the possession of different persons, all such persons who are not purchasers of it for value are proper parties, as the subject of the action, the partnership property is single, as well as the object of the action, an application of it to pay a balance to the partner to whom it is due.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 15; decided, April 30, 1859.

THIS is an appeal by the defendant, Easton, from an order made by Chief Justice BOSWORTH in December, 1858, overruling a demurrer taken by defendant, Easton, to the plaintiff's amended and supplemental complaint.

The original complaint was filed by George Wade, as executor of George Rusher, against John B. Rusher and Mary A. C. his wife, and stated in substance as follows:

That previous to the year 1841, George Rusher was engaged in business as a tinman in the city of New York, and had a stock therein of the value of $400; that in the said year 1841, a partnership was formed for carrying on such business between the said George and the defendant John B. Rusher, under the name J. B. & G. Rusher; John B. was to advance $800 in cash, and George his stock and fixtures, experience and skill, which were to be taken as of equal value with the said $800. The interest of each in the capital, profits and losses was to be same. The partnership was to be continued from year to year until dissolved by mutual consent. It lasted until the 18th of September, 1851, when it was dissolved by such consent.

The death of George Rusher, leaving a last will and testament by which the plaintiff was appointed his executor, and proof of the will in August, 1853, are then stated.

It also stated that the books were kept, and the financial part of the concern was managed by John; that they were carelessly kept, yet show a balance due to the estate of George of over $10,000; that the books have been examined by a competent accountant. Some details from them are then stated, from which the allegation of such a balance of debt appears to be made out.

That the health of said George began to fail in 1845, after which John B. had the mangement, and George no information of the affairs of the concern, except as derived from him. John B. represented, when applied to for money, that the concern was

earning little, and could not afford to pay more than was paid, as afterwards set forth.

That from the time George Rusher became indisposed until the 2d of December, 1848, he received only $3 a week from his partner; from that date until the 4th of December, 1849, but $2, and from thence to the month of December, 1851, but $1, when the allowance was wholly stopped.

That the said George brought an action in the Supreme Court against the said John B., to compel an account and payment of the balance due him, on the 15th September, 1851, and obtained an injunction. On the 18th of September, upon the representations of John B. of his utter inability to pay the amount due to George, it was agreed between them that the whole business should be assigned to George; and John B., in consideration thereof, should be fully released.

The bill states the repeated false and fraudulent representations of John B. made to induce this settlement, both as to his own inability to pay, and the state of the partnership business. In consequence of these representations, and believing and relying on the truth thereof, the assignment was accepted, the suit discontinued, and a release given to John B. from all liability on account of the arrearages of profits.

That since such settlement, discovery has been made that John B. had applied the partnership earnings to his own use, and that of his wife, Mary A. C. Rusher, except the sum of about $1,005.51 paid to George in his lifetime, and that the sum so applied amounted to $20,000.

There is then an allegation that the profits and earnings were employed in purchases of real estate, and that John B. caused conveyances of such real estate to be made to Mary A. C., his wife; that such real estate, or some part of it, was purchased with the profits of the firm, and is held by said Mary as trustee for her husband, with the fraudulent intent to keep the same from the creditors of said John B. There is then a specification of various parcels of property alleged to have been thus purchased and holden, with an averment of the full knowledge by said Mary of the fraudulent acts of her husband.

The complaint prayed, that an injunction against parting with or encumbering the property be granted; that a receiver of it be

appointed; that the release be declared null and void; and that the property so held by the said Mary might be declared liable for such sum as should, upon an accounting, be found due by the said John B. Rusher to said George, and that the plaintiff have judgment therefor.

The amended supplemental complaint, so far as it is necessary to be recited for the present purposes, states that in the latter part of 1851, John B. Rusher employed the defendant Easton, to attend to certain professional business, who thus became acquainted with such business and with the wife of John B.; that Easton became an inmate and boarder in his house; that the wife influenced the husband to give Easton a full power of attorney, authorizing him to sell, convey, and mortgage portions of the real estate; that Easton fraudulently and for a nominal consideration conveyed all the real and personal property of John B. Rusher amounting to upwards of $15,000 to one McGinness, who, on the same day, reconveyed it to said Easton. The lots and parcels of property so held by Easton and by Mary the wife are specifically set forth. And it is averred that a large portion of the funds of the partnership, appropriated as aforesaid, are invested in the said several lots of land so held by said Mary and by said Easton. Edward K. Orrell and Mary Orrell are also made parties defendants by the said supplemental complaint, and it states that they are the father and mother of Mary A. C. Rusher, and that said Mary Rusher and Mary Orrell broke open a trunk belonging to John B. Rusher containing funds belonging to said firm, and took and stole from it $800, which money is in the possession of Mary Orrell, and is represented in whole or in part by certain specified real estate, the title to which is nominally in said Mary Orrell.

The supplemental complaint prays for an injunction and receiver, "and that the plaintiff may have judgment herein as before prayed;" by the words "before prayed," referring to the original complaint.

The defendant Easton, demurred to the amended and supplemental complaint on the grounds: First, that several causes of action had been improperly joined, viz., causes arising on contract and causes arising in fraud, and causes of action against part of the defendants only, with other causes against all. Second,

that the complaints do not state facts sufficient to constitute a cause of action against the defendant Easton. That they do not show the plaintiff to be a judgment creditor of John B. Rusher; that they show a release of the original cause of action uncanceled; that they do not show a demand for the rescission of such release; neither do they ask any final relief against the defendant Easton.

The demurrer was overruled, with liberty to withdraw it and answer within twenty days, and from the order entered thereon this appeal is taken.

E. S. Van Winkle, for appellant.

I. The grounds of demurrer first assigned, are sufficient to sustain the demurrer, viz.:

That several causes of action have been improperly inserted in the complaint, causes of action founded on contract, and causes of action based on fraud and conspiracy to defraud, a cause of action by a creditor at large against one defendant only, with a cause of action for equitable relief against other defendants, and particularly against this defendant, founded on their and his alleged possession of property alleged to belong to the alleged debtor, and causes of action against part of the defendants only, with causes of action against all of the defendants.

Section 167 of the Code of Procedure, shows what causes may be joined:

1. "All causes joined must arise out of the same transaction, or transactions connected with the same subject of actions."

2. "Or all arise out of contracts express or implied."

3. "Or all arise out of injuries, with or without force, to person and property, or either."

4. Or all arise "out of claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same."

5. Or all arise out of "claims to recover personal property with or without damages."

6. Or claims against "a trustee by virtue of a contract, or by operation of law.

"But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, and must be separately stated." (*Boyd* v. *Hoyt*, 5 Paige, 65.)

The causes in this complaint manifestly do not all belong to one class, nor do they affect all the parties, nor are they separately stated.

The rule whereby the impleading of several parties not jointly concerned in all the transactions charged, has been held not to be multifarious, is only applied to cases where there was one connected interest all centering in the point in issue in the cause, or one common point of litigation, or that the joinder tended to prevent a multiplicity of suits. (See the two leading cases in this State; *Brinkerhoff* v. *Brown*, 6 Johns. Ch. R., 139; *Fellows* v. *Fellows*, 4 Cow., 682; see also *Cross* ads. *New Haven R. R. Co.*, 7 Abb. Pr. R., p. 47.)

What is the point in issue in this case, or the common point of litigation?

Is it not that John Rusher obtained the release by fraud?

If the release is good, can this action be sustained at all?

If the release is bad or null, will not the point in issue be whether John owed George anything?

If Easton has defrauded John of property, what has the plaintiff to do with that?

If John had filed this bill against his co-defendants, he might bring it within the rule that all the acts centre in the point in litigation, that is, combined fraudulent acts to deprive him of his property.

If the conspiracy charged were to defraud the plaintiff, there might be a single point in issue within the meaning of the rule.

II. The second cause of demurrer is as follows:

The complaint does not state facts sufficient to constitute a cause of action against Easton, because:

1. It does not show that the plaintiff is, or that the testator was a judgment creditor of John B. Rusher, and therefore entitled to ask relief against this defendant. (*Wiggins* v. *Armstrong*, 2 Johns. Ch. R., 144.)

In this case the Chancellor says: "This is the case of a creditor on simple contract, after an action commenced at law, and before judgment, seeking to control the disposition of the property of his debtor under judgment and executions, upon the ground of fraud. My first impression was in favor of the plaintiffs, but upon examination of the cases, I am satisfied that a cre-

ditor at large and before judgment and execution, cannot be entitled to the interference which has been granted in this case, (an injunction.)" In support of this position, he cited and commented on *Angell* v. *Draper*, (1 Vern., 399,) and *Shirley* v. *Watts*, (3 Atk., 200,) *Bennet* v. *Musgrave*, (2 Ves., 51,) *Balch* v. *Wastall*, (1 P. Wms., 445; Mitford, 115; Cooper Eq. Pl., 149,) *The Corporation of New York* v. *Mapes*, (6 Johns. Ch. R., 46,) *Snowden* v. *Noah*, (Hop. R., 353,) *Brinkerhoff* v. *Brown*. (4 Johns. Ch., 671.)

2. In this case the plaintiff has neither judgment nor execution, but on the contrary shows himself that he gave the debtor a release, which release is now in force, and yet he seeks to recover from Easton property which never even belonged to the debtor.

3. The complaint does show an outstanding release of the alleged cause of action against John Rusher.

4. It shows no privity of contract between the plaintiff and this defendant.

5. There is no conspiracy to defraud the plaintiff alleged, but merely a conspiracy by some of the defendants to defraud another defendant, which is no ground of action by plaintiff.

6. No demand for the rescission of the release is alleged. (*Boughton* v. *Bruce*, 20 Wend., 234.)

7. No offer to return to John Rusher the property received from him as a consideration for the release.

This is necessary. (*Masson* v. *Bivet*, 1 Denio, 69; *Bruen* v. *Hone*, 2 Barb., 586; *Rosenbaum* v. *Gunter*, 3 E. D. Smith's, 203.)

8. But plaintiff has no right to rescind. The release was given on a compromise of plaintiff's claims, then sought to be recovered in a suit at law, and the cause of action therein was the very cause herein set up.

The release is given in 1851.

The original complaint is filed in 1854.

The supplemental in 1858.

This settlement was made at arms-length, when plaintiff's testator had impleaded John Rusher for the fraud, and if they then took his mere assertions for truth, they are bound. (See *Fisher* v. *Conant*, 3 E. D. Smith's, 199.)

9. No final relief is asked against this defendant. No one is a proper party against whom no judgment is prayed.

A third party cannot be impleaded merely to ask an injunction against him; there must be some substantive relief prayed for. (See *Sweet* v. *Ingerson*, 12 How. Pr. R., 331; *Enos* v. *Thomas*, 4 id., 48; *Tompkins* v. *White*, 8 id., 520; *Dorman* v. *Killam*, 4 Abb. Pr. R., 202.) There should be judgment for defendant Easton, on the demurrer, with costs

James Morrogh, for respondent.

By the Court—Hoffman, Justice. The question may properly be examined upon the rules which would have governed a similar case before the Code; and then upon the point, whether the Code has varied the rules we may find to have prevailed.

In the first place, it is necessary to advert to a most important position of the defendant's counsel, upon which much of his reasoning proceeds, and which I apprehend is erroneous.

The cause of action—the point in issue—the common point of litigation, is not, as he urges, the setting aside of the release given by George to John B. Rusher. The foundation and primary cause of action is the partnership relation between the two, the asserted debt from John to George upon the transactions of that partnership, the investment of the funds of the firm (among other property) in various parcels of real estate specified, and the right to follow that property for the satisfaction of that demand.

Test this point by the ancient practice of the Court of Chancery before the disuse of special replication, and the introduction of what is termed the charging part of a bill. The plaintiff here would have set out his case as representative of the deceased copartner, alleged an indebtedness, demanded an account, asserted a lien upon the property in which the firm funds were invested, and sought to reach it by a decree. The defendant would have set up a release by plea or answer. A special replication would have assailed the release on the ground of fraud.

But afterwards the system of anticipating a defense arose, and the pleader put it in the shape of a pretense of the defendant, and met it by a charge of matter designed to overthrow it. (See Hoff. Ch. Pr., vol. 1, 41–43.) An example is given by Lord Redesdale of an heir-at-law filing a bill upon some equitable ground; and expecting a will to be set up, states it by way of a pretence of the defendant, and makes charges to impeach it.

Although Mr. Justice HARRIS appears to consider that this mode of framing a complaint is no longer proper, yet in the case before him, the pretense and charge were clearly improper under the former system of pleading. The charge was merely a restatement of the fact alleged in the complaint, and the pretense a statement of the defendants' denial of it. (*Clark* v. *Harwood*, 8 How., 470.)

I do not suppose that there is anything in the Code prohibiting a plaintiff from framing a complaint in the manner this complaint is framed—setting forth an original right of action; setting forth a defense, such as an account stated, or release, which may interfere with that right, and making statements which tend to remove that defense. The test of the question is this: that, without the statements showing the original cause of action, irrespective of the release, the complaint would be useless, however sufficient its allegations might be to set aside that release. The case of *Phillips* v. *Gorham*, (17 N. Y. R., 270,) appears to me decisive of the point: indeed, it is a much stronger case.

I apprehend, then, that the primary subject of the action, and its primary object, is the right to, and relief by, an account of the partnership dealings, and the payment of the debt alleged to be due, with the judicial determination that a lien exists for that debt upon the property specified. The removal of the release is subordinate and auxiliary thereto.

The next point of importance insisted upon by the defendants' counsel is, that the plaintiff cannot sustain such a claim for relief as he seeks against the defendant Easton, until he has obtained a judgment for his demand against the copartner of his testator, involving, of course, the cancelment of the release; that a lien is indispensable to entitle any one to assert any claim to the real estate in the hands of Easton; and that the relation is precisely the same as that of a creditor without a judgment.

I apprehend, however, that there are few points in the law of partnership more fully settled than this: that, where real estate has been purchased with partnership funds, each partner has an equitable lien upon it, not only as representing creditors to secure their rights through such lien, but for payment of his own eventual demand. If the title is taken in the name of one, he is a trustee, and the copartner a *cestui que trust*. This equitable lien

may always be successfully asserted against the partner, against his heirs, devisees, or his voluntary assignees, and against all except purchasers for value without notice. (The cases are collected in Collyer on Partnership, 4th Am. ed., §§ 125, 127, 135, and notes.)

If this conclusion is correct, then the two cases of *Fellows* v. *Fellows*, (4 Cow., 682,) and *Boyd* v. *Hoyt*, (5 Paige, 65,) appear to be decisive of the right to sustain the action as framed. When a judgment is obtained, a creditor's bill may be filed to reach the debtor's property; and different grantees of different parcels transferred fraudulently may be made parties to one bill. The lien affects every parcel and every grantee. The concurrence in accepting and upholding the fraudulent transfers creates a common responsibility, and makes the main object of the suit common to all.

It can scarcely be necessary to say, that the joinder of causes of action and of parties, which would have been allowed before the Code, will be permitted under the 167th section.

It remains to be examined whether the allegations of the present complaint are sufficient to bring the case within the rules of the authorities cited.

Easton is alleged to have been the attorney of John B. Rusher, and well acquainted with his dealings as well as those of his wife with the property in question. It is very clearly averred that the funds of the firm were invested in these specified parcels, some of which Mary took fraudulently to aid John in deceiving creditors, or to deceive himself and get control. Easton gets a power of attorney, through which he effects a transfer of the legal title to himself of all these parcels without any consideration, and apparently in violation of his duty to John. But, at any rate, under such conveyances as he claims upon, he stands exactly in John's position—the lands in his name are charged and affected with the equitable lien as fully as they would be if they remained in John's name.

The order at Special Term must be affirmed, with costs.

Simons, Plaintiff and Appellant, v. De Bare, Respondent.

1. The record of an inferior court to be competent evidence of a due judicial determination of the facts which it declares such Court to have decided, must show on its face that the Court had jurisdiction both of the action, and of the persons of the parties.
2. As the statute which establishes "The City Court of Brooklyn" and defines its jurisdiction, declares that "its jurisdiction shall extend," (1st), to certain actions which it enumerates, "when the cause of action shall have arisen, or the subject of the action shall be situated within the said city; (2d), to all other actions where all the defendants shall reside or be personally served with the summons within said city;" such Court is an inferior court, within the meaning of the rule first above stated.
3. To constitute a court a superior court as to any class of actions, within the common law meaning of that term, its jurisdiction of such actions must be unconditional, so that the only thing requisite to enable the Court to take cognizance of them, is the acquisition of jurisdiction of the persons of the parties.
4. Although section 4 of the statute establishing "The City Court of Brooklyn" enacts that, "the said City Court shall possess the powers and authority in relation to actions in said Court, and the process and proceedings therein as are possessed by the Supreme Court in relation to actions pending in the said Supreme Court. And all laws regulating the practice of the Supreme Court, and the course of procedure therein, shall, as far as practicable, apply to and be binding upon the said City Court, and the said City Court shall have power to review all of its decisions, and to grant new trials;" such section cannot be so construed as to make a part of such statute, a subsequent act in relation to courts named in it, and not including said City Court, to the effect, that "a voluntary appearance of a defendant is equivalent to personal service of the summons upon him."
5. The said 4th section prescribes generally the practice in actions, pending in the City Court of Brooklyn and its power over the process and proceedings in such actions, and cannot operate prospectively so as to apply to said Court subsequent statutory amendments of the Code of Procedure which, in terms, in no way refer to said Court, in such sense as to enlarge its jurisdiction, and make it extend to actions of which, by the statute establishing and defining its powers, it has no jurisdiction.
6. A judgment of said Court which purports to have been rendered "on hearing Mr. Samuel Brown, for the defendant," does not, by such a recital alone, show that the defendant caused his appearance to be entered in the action, nor that he personally appeared therein, nor that any attorney of said Court served "notice of an appearance, or retainer generally" for the

defendant in such action; and is not, of itself, sufficient to show that such Court acquired jurisdiction of the person of the defendant.

(Before BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF, PIERREPONT and MONCRIEF, J. J.)

Heard, April 9th; decided, May 7th, 1859.

THIS is an appeal by the plaintiff from an order made by Mr. Justice PIERREPONT, granting a new trial. The action was tried before the said Justice and a jury, February 19th, 1858, when the plaintiff recovered a verdict for $2,500 damages. The action is assault and battery, and is brought by Henry Simons against Reuben B. De Bare.

On the trial, the plaintiff called as a witness Fanny Behrman, who had been married to the defendant on the 17th of August, 1856. (The assault and battery were committed on the 16th of said August.)

"The defendant's counsel objected to her being sworn, on the ground that she was incompetent as a witness against her husband. The plaintiff then offered to prove by parol that a divorce had been granted, to which evidence defendant objected, and the objection was sustained. The plaintiff then offered in evidence a certified copy decree, of which the following is a copy:

"At a Special Term of the City Court of Brooklyn, held at the City Hall in the city of Brooklyn, on the 10th day of March, A. D., 1857,

"Present—Hon. E. D. CULVER, City Judge.

"FANNY DE BARE, by ZION BERNSTEIN, her next friend, &c.,
against
"REUBEN B. DE BARE.

"This action having been brought on to be heard upon the complaint herein, and upon report of Wm. T. B. Milliken, Esq., a referee duly appointed in this action, from which it appears that all the material facts charged in the said complaint are true, and that said defendant was, at the time of said marriage, physically incapable of entering into the marriage state, and that said incapacity still exists and is incurable.

"Now, on motion of O'Brien & Higinbotham, attorneys for the plaintiff, and on hearing Mr. Samuel Brown, for the defendant, it is ordered, adjudged and declared that the said marriage between the said plaintiff and the said defendant mentioned in the complaint was null and void, and the same is hereby declared a nullity, and the said parties are, and each of them is, freed from the obligations thereof.

"And it is further adjudged and decreed, on the stipulation and consent of the parties, that the said plaintiff, Fanny De Bare, do recover and receive from the defendant, and that said defendant do pay to her the sum of twelve hundred dollars in full for all claim of dower, and right of dower, and thirds, in the estate and property of the defendant, and in full for the costs and disbursements in this action, and that said plaintiff, by the said Zion Bernstein, as her guardian and next friend, do execute to said defendant a full and satisfactory release thereof for the consideration aforesaid.

"'Endorsed.' Filed March 10, 1857, 3:30 P. M.

"KINGS COUNTY, CITY OF BROOKLYN,
"In the Clerk's Office of the City Court of Brooklyn, } [ss.]

"I do hereby certify that I have compared the foregoing copy of an original decree of divorce with the original now recorded in my office, and that the same is a correct transcript thereof and of the whole of said original.

"In witness whereof, I have hereunto signed my name and [L. S.] affixed the seal of the said The City Court of Brooklyn, this 23d day of November, 1857.

"SAM. L. HARRIS,
"Clerk of the City Court of Brooklyn.

"Defendant objected to the admissibility of said decree as evidence of the facts therein cited, because it did not appear from said decree that the City Court of Brooklyn had jurisdiction to declare the marriage contract a nullity, or had acquired jurisdiction of the person of the defendant, or jurisdiction of the cause of action or subject matter of the proceeding. The Court overruled said objections severally, and decided that said copy decree was admissible in evidence, to which several rulings the counsel

for defendant did then and there except. Said certified copy decree was then read in evidence, to which reading defendant objected. The court overruled the objection and the defendant excepted. The plaintiff again offered said Fanny Behrman as a witness in the action against the defendant. The defendant objected to the admissibility of said witness. The Court decided that said person was a competent witness as to matters which occurred prior to the marriage, to which decision defendant excepted. Said witness was then sworn in the cause, and testified to matters which occurred prior to the marriage material to the issues in behalf of the plaintiff and against defendant."

A verdict having been rendered in favor of the plaintiff, and a motion made for a new trial having been granted, the plaintiff appealed from the order granting a new trial to the General Term.

P. Y. Cutler, for appellant (the plaintiff).

I. The mere fact that a decree was made, the *res ipsa*, may be proved by a production of the decree without the pleadings. (1 Greenl., § 511.)

II. A record of a court having a seal and clerk proves itself, because it is a record of a court of record, and imports absolute verity, (Greenl., § 503;) and it is conclusive between the same parties upon the matter adjudicated, because it is presumed to have jurisdiction. (1 Phill. Ev., 385, and notes; note 714, p. 1061; as to foreign Courts of Admiralty, see Story's Confl. L., 643; Coke Litt., 352 a.)

III. The City Court of Brooklyn is as much a court of record as the Superior Court is a court of record, and its records under seal are entitled to equal respect.

1. That the Court had jurisdiction of the parties is proved by the record.

(*a*.) It was not necessary to prove that they were residents of Brooklyn, any more than it would be necessary to prove that the defendants in the Superior Court were served in the city.

(*b*.) If the defendants had not been served at all, they would be bound, because they appeared by attorney, and that appearance is noted in the record. (Cow. & Hill's Notes, 799, 800; *Starbuck* v. *Murray*, 5 Wend., 148.)

(c.) Besides, consent confers jurisdiction over the parties where the Court has jurisdiction of the subject matter. When parties voluntarily come before a Court having jurisdiction of the subject matter, and submit to its jurisdiction, they are concluded.

2. A court of limited jurisdiction is not necessarily an inferior court. No court of record is an inferior court, and the Brooklyn Court is a court of record.

IV. The error has been in deeming the Brooklyn Court an inferior court. It is an inferior court in one sense, because its judgments may be reviewed; but every court in the United States, except the Supreme Court of the United States, is an inferior court in the same sense. In the legal acceptation of the term, it is not an inferior court, although a court of limited jurisdiction. Every court in the United States is of limited jurisdiction. (*Barber* v. *Winslow*, 12 Wend., 102; Notes to Phill. Ev., C. & H., 1016; *Selin* v. *Snyder*, 7 Serg. & Rawle, 166; *S. C.*, 11 id., 436; *Raborg* v. *Hammond*, 2 Harris, 42, 50; *Brittain* v. *Kinnaird*, 2 Brod. & Bing., 432.)

V. Even the proceedings of inferior courts are *prima facie* evidence of jurisdiction, when the jurisdictional facts are recited in those proceedings; and, although in England the cases have "fluctuated from absolute verity to mere nullity," yet, in America, the rule is that they are evidence until the contrary be shown. (See the whole subject discussed, in 2d vol. Notes to Phill. Ev., 1014.)

On page 1016 the note proceeds:

"In New York we may safely consider these jurisdictional recitals as *prima facie* evidence."

Citing *Barber* v. *Winslow*, (12 Wend., 102;) and that case, and the cases therein cited, fully sustains the position.

VI. The record was rightly received in evidence, and was of itself full proof, whether viewed as the proceeding of a superior or inferior court, that the Court had jurisdiction of the parties and subject matter, and the judgment should not have been reversed for that reason.

G. Dean, for respondent.

I. The City Court of Brooklyn is a court of inferior and limited jurisdiction. (Const., art. vi, §§ 3 and 14.)

1. The Supreme Court only has general jurisdiction in law and equity.

2. The power of the Legislature is limited to the establishment of "inferior local-courts." And if the act had purported to make the City Court of Brooklyn a court of "general" jurisdiction, it would have transcended the powers of the Legislature.

3. The acts establishing the court, (Laws of 1849, p. 170, and Laws of 1850, p. 148,) expressly limit its jurisdiction. (§ 2, act of 1849.)

II. The fact having been established that the decree offered was that of an inferior court, the authorities are clear that enough was not shown to make the copy decree which was introduced in evidence admissible. (*Bloom* v. *Burdick*, 1 Hill, 130; *Yates* v. *Lansing*, 9 Johns. R., 437; *Hart et al.* v. *Seixas*, 21 Wend., 40.)

1. There should always appear sufficient on the face of the proceedings in an inferior court to show that it has jurisdiction of the cause of which it takes cognizance. (*Powers* v. *The People*, 4 Johns., 292; *Bloom* v. *Burdick*, 1 Hill, 130; *Noyes* v. *Butler*, 6 Barb., 613; *Foot* v. *Stevens*, 17 Wend., 483; *Peacock* v. *Bell*, 1 Saund., 73; *Kundolf* v. *Thalheimer*, 2 Kern., 593; *Frees* v. *Ford*, 2 Seld., 176: *Turner*, Adm'r, v. *Bank of North America*, 4 Dall., 8.)

III. The decree not setting out facts showing jurisdiction, the divorce is not proved, and Fanny Behrman was an incompetent witness in the cause.

BY THE COURT—BOSWORTH, Ch. J. If the City Court of Brooklyn is an inferior court, within the meaning of the rule—that the jurisdiction of an inferior court will not be presumed in support of the validity of its proceedings, but, on the contrary, enough must appear upon its records, or be otherwise proved, to show that it had jurisdiction of the subject matter of the action and of the parties, in order to make its records evidence in another court—the present appeal may be briefly disposed of.

That Court has no jurisdiction of any transitory action, unless one of two facts exists: All of the defendants in it must either "reside or be personally served with the summons within said city." (Laws of 1849, p. 170, § 2, sub. 2.)

The judgment or decree given in evidence does not even recite that De Bare resided within that city when that action was, or may be claimed to have been, commenced, or when the judgment in it was rendered; nor that he was ever personally served with the summons in that action, within that city or elsewhere.

The act organizing that Court was passed the 24th of March, 1849.

Section 8 of the Code does not, in terms, apply to that Court any provisions of the Code, except sections 69 to 126, both inclusive. That Court is not named in section 9. It is by no means clear, therefore, that the concluding sentence of section 139 applies to that Court. That sentence was incorporated into the Code by the amendments enacted in 1851. (Laws of 1851, p. 887, § 139; p. 904, § 470, [§ 2;] id., appendix, p. 51, § 139; Laws of 1849, p. 644, § 139.) If it does not apply to that Court, then the voluntary appearance, in any transitory action, of a defendant not residing within that city, would not give to that Court jurisdiction of such action. Consent cannot confer upon any court jurisdiction of an action, when jurisdiction of it is not conferred by law.

To constitute a court, a superior court, (within the meaning of the rule we are considering,) as to any class of actions, its jurisdiction of such actions must be unconditional, so that the only thing essential, to enable the Court to take cognizance of them, is the acquisition of jurisdiction of the persons of the parties.

In *Kemp's Lessee* v. *Kennedy et al.*, (5 Cranch, 173,) Chief Justice MARSHALL, in speaking of the Court of Common Pleas for the county of Hunterdon, New Jersey, (the judgment of which, and the proceedings upon it, being relied on as a defense,) said, that, "In considering this question, therefore, the constitution and powers of the court in which this judgment was rendered must be inspected.

"It is understood to be a court of record, possessing, in civil cases, a *general jurisdiction to any amount*, with the exception of suits for real property.

"In treason, its jurisdiction is over all who commit the offense" * * *: "with respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused."

The action was ejectment, and the defendant made title under a judgment of such Court of Common Pleas, confiscating the real estate in question by reason of the treason of the person who was the common source of title.

The New York Common Pleas has been decided not to be an inferior court, within the meaning of the rule under consideration, because, by 2d Revised Statutes, 135, 2d edition, 1, it had power to hear, try and determine "all transitory actions, wherever the cause may arise," and was also a court of record, proceeding according to the general course of the common law. (*Foot* v. *Stevens*, 17 Wend., 483; *Hart* v. *Seixas*, 21 Wend., 40.)

In *Frees* v. *Ford*, (2 Seld., 176,) the present County Courts of this State were held to be inferior courts, and that it was essential to the validity of their judgments that "all the facts necessary to give the court jurisdiction, as well over the subject matter of the suit, as of the parties, must appear in the record."

By the 30th section of the judiciary act, (Laws of 1847, p. 328, § 30,) their jurisdiction extends to the transitory actions named in it, "when all of the defendants, at the time of commencing the action, reside in the county in which said court is held," * * * and "when the debt or damages claimed" do not exceed the sums specified.

They had not, therefore, a general and unconditional jurisdiction of any transitory action, and were also, in respect to the cases in which jurisdiction of the actions enumerated existed, so far as it depended on the residence of the defendants, limited to those in which the debt or damages claimed did not exceed a specified amount.

Without entering into a more detailed statement of the facts of the various adjudged cases, or of the reasons on which they were decided, we think it may be stated, as a settled rule, that when the judgment of a local court, in a transitory action, is offered as evidence that a particular fact has been judicially determined by competent judicial authority, the record of the judgment will be no evidence of that fact, unless it affirmatively appears, by the record itself, that all the facts necessary to give the court jurisdiction, both of the subject matter of the suit and of the parties to it, existed: if the court, by the law creating it, has no jurisdiction of that particular action, nor of any transitory

action, unless all the defendants resided, or were personally served with the summons, within the city within which such court is required by law to be held.

Such a court is not only one of limited jurisdiction; but its jurisdiction of every action—of the action itself—being made to depend either upon the place where the defendants reside, or the fact that they are "personally served with the summons" within a designated locality smaller than a county, it is an inferior court within the common law meaning of that term.

If the court had a general jurisdiction of an enumerated class of actions, without reference to the place where they arose or the parties to them resided, or to the amount sought to be recovered, being a court of record and proceeding according to the general course of the common law, it might be, *quo ad hoc*, a superior court, within the meaning of the rule under consideration.

Having jurisdiction in the action, jurisdiction of the persons of the parties in it might be acquired by their voluntary appearance.

But the difficulty in the present case is, that the court had no jurisdiction of the subject matter of the suit; of the action itself, unless the defendant resided within the city of Brooklyn or was personally served with the summons within that city.

Such a court is an inferior court, within the common law meaning of that phrase. Its judgment must show on its face, that the defendant resided or was personally served with the summons within that city, to be *per se* evidence in another court of a valid judicial determination of any fact which it purports to decide.

This is not shown by the decree or judgment which was received as evidence, that the defendant and his wife had been divorced by that court, in an action between them instituted for that purpose.

But, it is insisted that the 4th section of the act creating the court, and the amendment made to section 139 of the Code, in 1851, have, together, the effect to enlarge the jurisdiction of that court, and make it more extensive than it was by the statute alone, by which the court was created.

That 4th section reads thus: "The said City Court shall possess the powers and authority in relation to actions in said court, and the process and proceedings therein as are possessed by the Supreme Court in relation to actions pending in the said Supreme Court. And all laws regulating the practice of the Supreme Court, and the course of procedure therein shall, as far as practicable, apply to and be binding upon the said City Court, and the said City Court shall have power to review all of its decisions and to grant new trials." (S. L. of 1849, p. 171, § 4.)

We think this section must be construed as prescribing the practice in actions in the City Court of Brooklyn, and its power over the process and proceedings in such actions; and that it cannot be so construed that subsequent amendments of the Code, not referring to that court, shall be held to enlarge, and as having been intended to enlarge its jurisdiction.

If the Legislature had intended, by the amendment made in 1851 to section 139 of the Code, to extend the jurisdiction of that court by force of such amendment, to all transitory actions against persons not residing within the city of Brooklyn, on their voluntary appearance therein; it would seem that section 8 would have been so amended as to designate it as one of the courts to which that section was applicable, and that section 9 would have been so amended that such court would have been named in it.

It is quite clear, as we think, that section 4 of the act creating that court, does not apply to it, the provisions of section 135 of the Code, so as to enable a person to commence an action in it, against a sole defendant not residing within the city of Brooklyn, by the publication of a summons. The concluding sentence of section 139, as it was amended in 1851, does not, in our opinion, affect the question of the jurisdictional capacity of the court, nor change it from an inferior to a superior court.

This view renders it unnecessary to decide the question, whether a copy of the judgment of a superior court, in an action of divorce, without a copy of the pleadings, would be competent and sufficient evidence that the parties had been and were divorced by a regular and valid judicial determination, provided the judgment recites the nature of the action, and the appearance of the parties in court, and that they were heard on the application for judgment. Being an inferior court, it was necessary to

produce a judgment roll which showed on its face that the court had jurisdiction both of the action and of the persons of the parties. This not having been done, the judgment was erroneously received as evidence, and the order granting a new trial on account of that error, must be affirmed with costs.

It may also be observed, that if "a voluntary appearance" of R. B. De Bare would as effectually give that court jurisdiction of that action, as the personal service of a summons upon him within the city of Brooklyn; the judgment does not recite that he caused his appearance to be entered; nor that he personally appeared therein; nor that any attorney of the court served "notice of an appearance or retainer generally" (Rule 11) for him in that action; nor that "Mr. Samuel Brown" who was heard for him, was an attorney; or had served notice of appearance for him; or that he had been retained for him in that action.

HOFFMAN, J. (Dissenting.) The objection to the judgment produced rests upon the ground that the City Court of Brooklyn is a court of inferior limited jurisdiction, and hence, in the language of the defendant's points, "there should always appear sufficient upon the face of the proceedings to show that it has jurisdiction, of the cause of which it takes cognizance. The decree in question did not set out facts showing such jurisdiction."

The City Court of Brooklyn was organized by an act of the Legislature of the 24th of March, 1849. (Sess. Laws 1849, ch. 125.) It was declared to be a court of record, and its jurisdiction to extend to the following cases: 1. To the actions enumerated in section 103 (new 123) of the Code of Procedure, when the cause of action shall have arisen, or the subject of the action shall be situated within the said city. 2. To all other actions, where all the defendants shall reside, or be personally served with the summons within said city. 3. To actions against corporations created under the laws of this State, and transacting their general business within said city, or established by law therein.

This action, to pronounce the nullity of the marriage, was within the jurisdiction of this Court, provided the defendant resided or was personally served with the summons within the

city of Brooklyn. It is said that neither of these facts appears upon the document produced.

It deserves notice that the objection comes from the defendant in this action, who was the defendant in the cause in which the proffered judgment was given.

The first question I shall examine is, whether the last clause of the 139th section of the Code, adopted in 1851, that a voluntary appearance of a defendant shall be equivalent to personal service of a summons upon him, does not apply to the proceedings in the City Court of Brooklyn.

The Code, as passed on the 12th of April, 1848, contained in the 8th section the same provision as to the titles of the second part applicable to all courts, and those applicable to the enumerated courts, as is found in the present 8th section, except that the number of the titles was twelve instead of fifteen. The section, as it now stands, was adopted the 11th of April, 1849.

When the Code of 1848 went into effect, the City Court of Brooklyn had not been established. It was organized by an act of the 24th of March, 1849, to go into effect on the 1st of May ensuing, except some few sections, as to elections, &c., which went into effect immediately.

In 1848 and in 1849, the 139th section of the Code was merely that jurisdiction was acquired from the service of the summons, or allowance of a provisional remedy. In 1851 the clause was added, " A voluntary appearance of a defendant is equivalent to personal service of the summons upon him."

In *Mahaney* v. *Penman*, (4 Duer, 601,) it was held at Special Term, two other Judges concurring, that a defendant who voluntarily appeared and answered, could not, in his answer, take the objection of a want of jurisdiction in the Superior Court.

The case of *Burckle* v. *Eckhart*, (3 Comst., 132,) was cited, where the Court of Appeals held, upon a question of the jurisdiction of a Vice-Chancellor, the cause of action appearing to have arisen elsewhere than in his circuit, that a voluntary appearance by a solicitor did not give jurisdiction. "The residence of a party within the circuit was a jurisdictional fact which must exist before the Court can act at all, either by issuing process or accepting the appearance of the defendant."

This case was decided in December, 1849, and in April, 1851, the clause of the Code referred to was adopted. (Laws 1851, p. 887.)

When the Legislature, in March, 1849, established the City Court, must it not have meant that the proceedings and practice should be regulated by the Code of Procedure, passed in 1848? Was it to be left to some other course of proceeding, except as expressly provided? The argument, from the omission in the enumeration of the courts in the 8th section, in 1848, is of no weight, as this court did not exist, although the omission in 1849 is so. Yet it seems to me that the 4th section of the act was adopted with a view to meet the very point. It directs, "that the City Court shall possess the powers and authority, in relation to actions in the said Court, and the process and proceedings therein, as are possessed by the Supreme Court in relation to actions pending in said Supreme Court. And all laws regulating the practice of the Supreme Court, and the course of procedure therein, shall, as far as practicable, apply to and be binding upon the said City Court."

It deserves notice that the preamble to the Code uses the phrase, that a uniform course of proceeding in all cases should be established.

The powers of the Supreme Court in relation to actions—the process and proceedings in such Court—all laws regulating its practice and the course of its procedure, define and govern the mode of action in the City Court, of course where applicable, and when not otherwise specially regulated. It seems to me, that not only was the law of the Code which governed the Supreme Court as the Code then existed, necessarily declared to be the law of the City Court when constituted, but that the section was prospective, and whatever rule should subsequently govern the proceedings in the Supreme Court should be equally applicable to this.

If so, when the amendment of 1851 gave a rule to the Supreme Court, it gave one equally to the City Court.

The City Court has applied, and determined cases upon, provisions of the Code not within the four first titles mentioned in the 8th section, (§§ 69 to 126, inclusive.) *Toomey* v. *Shields*, (9 Legal Obs., 66,) involved the consideration of section 128.

It may aid this examination to advert to the provisions respecting other of the courts enumerated in the 8th and 9th sections, for example the Superior Court. The jurisdiction which it could possess in an action like the present to declare a marriage null, under section 33, (sub. 2,) could only be when the defendant resided, or was personally served with the summons, within the city of New York. The Code is expressly made to regulate its course of procedure by section 8. Thus it stood in 1848 and 1849. Then in 1851, the change in the 139th section was made. The effect was undoubtedly to enlarge the jurisdiction of this Court by permitting the voluntary appearance to be the same as personal service.

Now, if by force of the 4th section of the act as to the City Court, the Code was to govern its course of procedure, it seems difficult to say that the effect of the change in 1851, shall not be to enlarge its jurisdiction, when it is so as to the Superior Court. Grant that the Code was applicable at all, it seems to follow that all subsequent amendments of the Code not clearly inapplicable, will regulate this Court as well as the others. On what ground is a distinction to be made, between different subsequent amendments, so as to render some applicable and others not so. There are some, of course, which clearly cannot apply.

The argument that jurisdiction is not to be deduced by implication, but must be expressly given, seems to me as forcible in relation to the Superior Court as to the one in question. We extend the jurisdiction of the former by the new clause, because the Code itself makes the Code relate to such Court, we do the same here because a particular statute makes the Code apply.

The effect of an appearance in an action is stated in several cases. The party admits himself to be regularly in Court, and all defects in the summons, and its service, and even the total omission of any service, becomes immaterial. (*Webb* v. *Mott*, 6 How. Pr. R., 439; see as to the course in Chancery, 1 Barb. Ch. Pr., 81, 1 Hoffman's Pr., 170, particularly the case of *Capell* v. *Butler*, 2 Sim. & St., 462.)

We have in the present case, undoubted jurisdiction of the subject matter of the action, viz., the annulment of the marriage contract for physical incapacity, provided the defendant resided or was served within the city of Brooklyn. We have a recital

in this judgment of what is equivalent to a general appearance, to an admission that he was regularly in Court, with a consent recited to certain portions of the decree or judgment.

This is not properly a consent that a tribunal shall have jurisdiction of a case which the law has expressly or impliedly forbidden it to entertain. It is tantamount to an admission of residence, or of personal service, completing all that was necessary to perfect the jurisdiction.

The meaning of the rule that consent cannot give jurisdiction, is well explained in the case of *Overstreet* v. *Brown*. (4 McCord's R., 79.) Jurisdiction cannot be given to a court merely by consent of parties; but if the court has jurisdiction of the matter, and one party has some privileges which exempt him from that jurisdiction, he may waive the privilege if he chooses so to do. This is repeated in nearly the same language in *Bostwick* v. *Perkins*. (4 Geo. R., 47.)

Mr. Justice HAND, in *Kundolf* v. *Thalheimer*, (2 Kern., 593–599,) adverts to such a distinction, between jurisdiction depending upon residence of the person, which could be waived by appearance and pleading, and jurisdiction of the subject matter. He refers to *Frees* v. *Ford*, (2 Seld., 176,) which arose upon pleadings, and observes that the pleas in that suit were, in truth, nothing more in effect than demurrers to the complaint.

So in the case of *Burckle* v. *Eckhart*, (*ut supra*,) the main objection was, that the Vice-Chancellor had not jurisdiction of the causes or matters, because they did not arise within his circuit; and Justice GARDINER notices that a defendant may dispense with service of process as he may waive any other personal privilege. But there, the bill alleged that the defendants were non-residents, and the latter appeared and admitted it. The want of jurisdiction appeared on the record.

It should be noticed, that there is much late authority to show "that recitals or statements, in the record of an inferior court, of facts constituting jurisdiction, may be received as *prima facie* evidence of such facts." By the Court, PAIGE, P. J., in *Harrington* v. *The People*, (6 Barb., 607–610,) WILLARD, P. J., in *Adams* v. *Saratoga & Washington Railroad Company*. (11 id., 455.) This decision was reversed on appeal, (note at p. 415,) but on the ground that the evidence offered to disprove the jurisdictional

facts recited in the record, should have been received in evidence. (April, 1852.) I have not been able to find a report of the case in the Court of Appeals. See, also, *Barber* v. *Winslow*, (12 Wend., 102,) as to the distinction in this particular between the rules of evidence and the rules of pleading. See, further, *Clyde & Rose Plank Road Company* v. *Parker*. (22 Barb., 324.) The recitals in a discharge under the insolvent laws are held to be *prima facie* evidence only, of jurisdictional facts. (*Stanton* v. *Ellis*, 2 Kern., 575.) But this is a qualification of the statute. (2 R. S., 38, § 19.)

It must be admitted, that many of the judges, in the authorities cited to support the position of Justices PAIGE and WILLARD, use very different language. Yet it appears to me, that if the proposition can be maintained, that the clause of the 139th section, before discussed, applies to this Court, then a record of such Court, (using the term in the sense of a judicial determination of rights of the parties in a cause,) which shows on its face jurisdiction of the subject of the action, and a voluntary appearance of the defendant, meets the requisition of the rule; that the record shall show jurisdictional facts, in its just sense.

3. This does not, however, fully decide that there may not be a technical difficulty still existing, that the whole of the proceedings, which constitute the roll, should be produced. I proceed to that question.

Mr. Gresley (On Evidence in Equity, 109,) says: Where a decree contains a recital of a bill and answer, it may be admitted in evidence, without further proof of them. He cites TREVOR, Ch. J., in *Wheeler* v. *Lowth*, (Comyn's Dig. C. 1, p. 97,) and TWISDEN, Justice, in *Trowell* v. *Castle*. (1 Keble, 91.)

Trowell v. *Castle* is an express authority to the point, where the exemplification was under seal. This distinction would not, I apprehend, be now regarded. But in the present case, the decree is authenticated by the seal of the Court.

BULLER, Justice, (Buller's N. P., 235,) thus states the rule: If a party wants to avail himself of a decree only, and not of the answer or depositions, the decree, being under the seal of the court, and enrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to show that the point in issue was not *ad idem* with the present

issue. He cites *Lord Thanet* v. *Patterson*. (K. B. East. 12, Geo. II.)

Under decisions in our State, the enrollment of the decree would be unnecessary. (5 Wend., 47; 5 Paige, 304.)

In *Layburn* v. *Crisp*, (8 Carr. & Payne, 397,) upon a trial at bar, all the Judges concurred in holding that a decree in Chancery, with the bill and answer, was admissible in evidence without producing the depositions. Lord ABINGER said he was not certain, but that the decree would have been receivable without the bill and answer being put in.

In *Davies* v. *Lowndes*, (1 Bing. N. C., 597,) also a trial at bar, a decree in Chancery was read in evidence. It does not appear whether the pleadings were introduced. (*Blower* v. *Hollis*, 1 Cromp. & Meeson, 393.)

In *Wynn* v. *Harman*, (5 Grat., 157,) a decree in partition and the report of the commissioners sufficiently designating the land referred to, was admitted without producing the whole record.

In *Whitmore* v. *Johnson's Heirs*, (10 Hum., 610,) the rule is explicitly admitted, that if a decree is in itself sufficiently comprehensive to show what was adjudged, and jurisdiction, it would suffice without producing the bill and answer. These were recited, but not in detail. The defect was, that the decree did not show that personal estate was exhausted, which was a statutory prerequisite to a sale of real estate by the tribunal which had ordered such sale.

When the fact of jurisdiction is made out, every intendment of regularity is made to support a judgment or decree, and regularity of proceedings. (21 Wend., 40.) Particularly is this the case, when the decree is proffered to be used against a party who was a party to the suit itself, and when he himself can immediately contradict its recitals, even by his own oath. It was decided by the King's Bench, in *Ackworth* v. *Kempe*, (Doug., 40,) that a writ of execution is evidence of a judgment as to the party to the action in which it is given.

Order affirmed.

JOSEPH H. WESTCOTT, Plaintiff and Appellant, v. WALTER KEELER, Respondent.

1. Where the complaint states, and the uncontradicted evidence given at the trial tends to prove, that M. (the plaintiff's assignor) lent to the defendant money, on the security of a note made by R., payable to his own order, and indorsed by him and by the defendant, and that on such note maturing, M. surrendered it to R. for a new note of the same amount, payable on demand, made and indorsed by R., and so surrendered it at the defendant's request and on his promise to indorse such new note, and that the defendant refused to indorse such new note, or pay the money so lent to him, it is error to dismiss the plaintiff's complaint, although the surrendered note has been destroyed.
2. On such a state of facts, the defendant is liable as borrower, and an action may be maintained against him as such; the note which he indorsed as security for the loan having been surrendered at his request to the maker of it.
3. Such a cause of action is assignable, and the assignment in this case transferred it.
4. Such evidence entitles the plaintiff to a peremptory charge that a verdict be given in his favor, or requires that the cause be submitted to a jury, with instructions that if the defendant borrowed the money, and if the note left as security for the loan was surrendered at his request, the plaintiff is entitled to recover.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 5; decided, May 7, 1859.

THIS is an appeal by the plaintiff from a judgment dismissing his complaint, and also from an order denying a motion for a new trial.

The action was tried before Mr. Justice PIERREPONT, and a jury, on the 1st of November, 1858. The plaintiff sues as the assignee of a cause of action, which, as stated in the complaint, is in substance as follows:

On the 6th of September, 1854, one Schuyler H. Mattison loaned to the defendant $3,000, upon the note of one John W. Rumsey for that amount, payable on the 1st of October then next, drawn payable to Rumsey's order, and indorsed by him and by the defendant. The loan was made by Mattison to the defend-

ant on the collateral security of said note, and of a certificate for 100 shares of the stock of the Suffolk Bank.

At about the time said note fell due, the defendant went to Mattison and told him said Bank had failed, and asked him for an extension of the time for the payment of said note, and proposed to him to take a new note of Rumsey indorsed by the defendant, which Mattison agreed to do, and at defendant's request went with the old note to Rumsey on the day it fell due; took from him a new note dated October 1, 1854, for $3,000 drawn to his own order, payable on demand, by him indorsed and to be indorsed by the defendant, and left the old note with Rumsey, who destroyed it.

The defendant refused to indorse the new note, or to pay the moneys so loaned to him. Rumsey, since the first note matured, has paid various sums on account of the moneys so lent; the balance unpaid being $704.50, with interest from the 23d of December, 1856.

The answer, substantially, denies each allegation of the complaint; alleges that the loan was made to Rumsey, and not to the defendant; that the defendant was the agent of Rumsey in procuring it, and was known to Mattison to be such agent; and that said loan was made upon an agreement reserving interest at the rate of eighteen per cent per annum.

On the trial, Schuyler H. Mattison was called as a witness on the part of the plaintiff, and testified, among other things, as follows: "On September 6th, 1854, Walter Keeler came into my office and requested a loan of $3,000 until the 1st of October, and offered as security John W. Rumsey's note for $3,000, due October 1, 1854; I said I didn't wish to loan money to anybody; that I wanted my money in my business; finally he pressed the matter so hard that I consented to let him have it if he would pay it promptly when due; I got up out of my chair at my desk; Mr. Keeler sat down and indorsed the note made by Mr. Rumsey to his own order, and indorsed by him; he then handed me 100 shares of Suffolk Bank stock; I think it was 100 shares of $50 each; he said, take this too, and I replied, I don't want it, I know nothing about the Bank or Mr. Rumsey, I loan the money on your own responsibility, as I have frequently done before; he insisted on my keeping the stock, and I did so; I re-

quested Mr. Bain, my clerk, to write an order on Bliven & Mead for $3,000, payable, I think, to bearer; I signed the order and handed it to Mr. Keeler; he went out of the office with it, and returned in about twenty minutes with a check to my order for the money drawn by Bliven & Mead, and I indorsed it and handed it to him; Keeler's language when he came in, was, 'Mattison, I want you to lend me $3,000 till the 1st of October, I will give you Rumsey's note with my indorsement for $3,000;' never had seen, or to my knowledge heard of Rumsey, and only knew Suffolk Bank by its locality; on the 1st of October I had put the note in my safe; not in Bank, and kept it in safe; Keeler called, and then said Bank had failed, or got into difficulty, and wanted time, and proposed to give new note for amount, payable on demand, which he said he would pay in a few days; I said, very well; then he said, 'I am very busy; you are going past the Bank several times a day, I wish you would call on Mr. Rumsey and get a new note for the old note; bring it to me and I will indorse it;' I told him I would; I immediately went up to Bank with the old note, and spoke to the gentlemen at the counter, and inquired for Mr. Rumsey; he said, 'I am the man;' he asked me to step back to his private office, and I went; I handed him the old note, and told him Mr. Keeler had requested me to call for new note; he said, 'yes; Mr. Keeler has seen me on the subject;' he made and handed me the new note." Witness identified note, which was marked "A." It was as follows:

"$3,000. NEW YORK, Oct. 1st, 1854.

"On demand, I promise to pay to the order of myself, three thousand dollars, at value received.

"J. W. RUMSEY."

It was indorsed "J. W. Rumsey," and following receipts were indorsed on it. "Oct. 20, 1854, rec'd on within note one thousand dollars, S. H. Mattison;" "Nov. 1st, rec'd on within one thousand dollars, S. H. Mattison;" "1855, Jan. 24th, rec'd on the within note one hundred, $100, S. H. Mattison."

"I went directly to Keeler's office, and said, 'here is this note, I want you to put your name on it;' he replied, 'never mind, Mr. Rumsey will pay it in a few days;' said I, 'he may, but that

is not our agreement; you was to indorse it; I loaned you the money;' he repeated the same answer two or three times, that Rumsey would pay it in a few days, and I left the office; I asked him probably one hundred times, also Rumsey, for the money for two years, till I sold it." (Witness reads from back of note a receipt from Rumsey, Oct. 20, 1854, for $1,000; and on November 1, 1854, for $1,000; also sum paid by Rumsey January 24, 1855, $100.) Says "that he sued Rumsey on the note and got judgment, and after judgment Rumsey paid further, and left balance as claimed by summons, $704.50; I assigned this claim to plaintiff." Assignment read, and dated March 9th, 1857, viz.:

"Know all men by these presents, that I, Schuyler H. Mattison, * * of the first part, for and in consideration of the sum of five hundred dollars, to me in hand paid by Joseph H. Westcott, * * of the second part, have * sold, assigned, * * and by these presents do * sell, assign and set over unto the said party of the second part, all the indebtedness, cause of action, claim and demand whatsoever which I, the said party of the first part, now have against Walter Keeler, of said city, for borrowed money, and for a failure and refusal on his, the said Keeler's part, to indorse, according to promise, a promissory note of John W. Rumsey, dated October 1, 1854, for $3,000, payable on demand, taken by the said party of the first part at the request of the said Keeler, in renewal of a note dated September 6, 1854, drawn by said Rumsey, and indorsed by said Keeler, and payable October 1st, 1854, for $3,000, on which said Keeler originally borrowed moneys, which said indebtedness, after several payments made by said Rumsey, did, on the 23d day of December. 1856, amount to seven hundred and four dollars and fifty cents, or about that sum, and bears interest from that date." * * *

Mattison's order on Bliven & Mead for the $3,000, their check to Mattison's order for that sum, indorsed by him, and subsequently by Rumsey, and the certificate for the 100 shares of Suffolk Bank stock, (which certificate stated Rumsey to be the proprietor of such stock,) with a blank power of attorney to transfer it, were produced on the cross-examination and read in evidence. John G. Bain, was also examined on behalf of the

plaintiff, and gave evidence in substance like that of Mr. Mattison. The plaintiff then rested and the defendant moved to dismiss the complaint on the grounds,

"*First.* That the original loan was made on the first note, and was merged in it.

"*Second.* That the action was not brought, and could not be sustained, on the first note.

"*Third.* That the agreement to indorse the second note was void within the statute of frauds.

"*Fourth.* That if the action was brought for the deceit, it was not sustained by the pleadings or proof; and,

"*Fifth.* That even if it was, such right of action could not be assigned, and did not pass to the plaintiff under the assignment." The Judge granted the motion, and the plaintiff excepted to his decision.

The plaintiff moved at Special Term, on a case, for a new trial, and the motion was denied. From the order denying it, and from the judgment dismissing the complaint, the plaintiff appealed to the General Term.

James W. Gerard, for appellant (the plaintiff).

I. The plaintiff can recover, either:

1. On the original loan.

2. Or on the indorsement of the defendant on the note surrendered to the maker at his request.

3. On the promise to indorse a new note.

a. On the original loan, for securing which the original note was left as collateral security. Taking the note did not merge or destroy the contract of loan, for which the plaintiff can recover, merely accounting at the trial for the note taken as collateral security for the loan, which the plaintiff did. (*Jackson* v. *Shaffer*, 11 John., 513; *Swartwout* v. *Payne*, 19 id., 294; *Hughes* v. *Wheeler*, 8 Cow., 77; *Davis* v. *Anable*, 2 Hill, 339; *Andrews* v. *Smith*, 9 Wend., 53; *Muldon* v. *Whitlock*, 1 Cow., 290; *Johnson* v. *Weed*, 9 John., 310; 1 Kern., 368.)

b. The plaintiff could recover against the defendant as indorser on the original note which was given up to the maker at defendant's request. The surrender or destruction of the note did not destroy the right of action. (*Olcott* v. *Rathbone*, 5 Wend., 490;

Hughes v. *Wheeler*, 8 Cow., 77; Edwards on Promissory Notes, p. 633.)

c. Or on the promise to indorse the new note, the consideration of which promise was the original loan, or the surrender of the original note, on which the defendant was indorser, at the defendant's request.

II. These causes of action, all and each of them, are on contract, and are assignable by the 111th section of the Code. *Zabriskie* v. *Smith*, (3 Kern., 332,) has nothing to do with this case.

III. The promise of the defendant to indorse the new note, is not within the statute of frauds. The statute of frauds has nothing to do with it. It is an original undertaking, founded on good legal consideration. (*Meech* v. *Smith*, 7 Wend., 318.)

John E. Burrill, for the respondent (the defendant).

I. The original note was given to Mattison, the assignor of the plaintiff, and received by him in payment of the money loaned, and instead of an absolute liability to pay the loan, the defendant incurred, the conditional obligation of indorser of the note, and Mattison's right of action rested exclusively upon the note. (*Whitbeck* v. *Van Ness*, 11 John. R., 409; *Francia* v. *Del Banco*, 2 Duer, 138; *Booth* v. *Smith*, 3 Wend., 66.)

II. The plaintiff was not entitled to recover upon the original note.

1. The complaint does not contain any allegations authorizing a recovery upon the original note; nor is the action brought upon such note; nor did the plaintiff at the trial claim the right to recover upon it.

2. Even if Mattison could have maintained an action upon the original note, the plaintiff could not, because the assignment does not transfer to him any interest in the note, or any right of action upon it.

3. Even were the complaint based upon the note, and the assignment sufficient to transfer such right of action, the plaintiff was not, on the evidence, entitled to recover upon it.

III. The plaintiff was not entitled to recover, upon the alleged agreement to indorse the second note.

1. The complaint was not based upon any such right of recovery.

2. The agreement was void within the statute of frauds. (*Gallager* v. *Brunel*, 6 Cow., 349; *Carville* v. *Crane*, 5 Hill, 483.)

IV. The plaintiff was not entitled to recover on the ground of fraud or deceit on the part of defendant, in not indorsing the note.

1. Even if Keeler did promise to indorse the new note of Rumsey when it should be received, and Mattison gave up the old note to Rumsey, and took the new one, and Keeler then refused to indorse it—this did not establish any fraud upon the part of Keeler. (*Gallager* v. *Brunel*, 6 Cow., 349; *Fisher* v. *N. Y. C. P.*, 18 Wend., 610; 1 Rawle, 311; *Alston* v. *The Mechanics' Mut. Ins. Co.*, 4 Hill, 329.)

2. Even had such conduct, on the part of Keeler, amounted to a fraud or deceit, so as to authorize Mattison to recover therefor, such right of action was not assignable. (*Zabriskie* v. *Smith*, 3 Kern., 322; *Hyslop* v. *Randall*, 4 Duer, 662.)

The judgment should be affirmed.

HOFFMAN, J. The evidence seems to establish, with reasonable certainty, that Keeler, the defendant, applied to Mattison for a loan for himself of $3,000, proffering as security the note of Rumsey indorsed by himself, and Suffolk Bank stock as additional security. Mattison hesitated, stating he did not know the Bank or Rumsey. He afterwards consented. An order was drawn on Mattison's banker, and Keeler sat down and indorsed the note, and gave it to Mattison.

The order was on Bliven & Mead, the bankers, signed by Mattison, payable to bearer. They gave a check on the City Bank, payable to Mattison or order, for $3,000. He indorsed it. Keeler took Mattison's order to the banker's, and brought back the check. Mattison delivered the indorsed check to Keeler, and it is produced in evidence, indorsed by Rumsey, not by Keeler.

Testimony was also given, tending to prove that the note was kept by Mattison in his own hands, and that about the time of its falling due, Keeler, the defendant, called, informed Mattison of the failure of the Bank, and requested time, proposing to give a new note for the amount, payable on demand; that defendant requested him, from some reasons of convenience, to call on Rumsey, get a new note for the old one, to bring it to him, the defendant, and he

would indorse it. This was done, and the old note given to Rumsey; a new one obtained, and proffered to the defendant for indorsement, which he refused to make. Both the old and the new note were drawn by Rumsey, to his own order.

The assignment from Mattison to the plaintiff was produced in evidence, and transfers all the indebtedness, cause of action, claim and demand which he had against the said Walter Keeler for borrowed money, and for a failure and refusal on his part to indorse, according to promise, a promissory note of John Rumsey, dated October 1, 1854, for $3,000."

The first note was dated September 6, 1854.

The evidence given in the cause would have warranted a jury in finding two facts: First. That the original loan was made to Keeler at his request, and as far as Mattison knew for Keeler's own use and benefit, and upon the faith of Keeler's indorsement of Rumsey's note. Although the note was made by Rumsey, and the stock certificate was in his name, the jury may have been warranted in considering that both were given to enable Keeler to raise money for himself. Second. That the old note was surrendered to Rumsey by Mattison, upon Keeler's express promise to indorse a new one which Rumsey was to give. It is to be noticed that the old note, as well as the new one, was by Rumsey, to his own order.

If the jury had been allowed to pass upon this evidence, and had found these facts, the case would have been presented of an original debt by Keeler to Mattison for money advanced by the latter directly to him, on his credit mainly, and secured by his indorsement; and of the surrender of the legal evidence of his liability by a trick and fraud, either devised at the time, or perpetrated by the refusal to give the promised renewal of this evidence.

If, as is contended, the original cause of action arising from the loan of money, was merged in the indorsement of the first note, (2 Duer, 138,) yet, when that indorsement was destroyed by the unwarranted act, or through the substituted agreement of the indorser and borrower, the party must be entitled to resort to the original right.

The cases cited, of which *Noel* v. *Murray*, (3 Kern., 167,) is an example, are cases where the point has arisen, whether an admitted original liability has been relinquished by acceptance of other security; and the question always is, was there an agreement to receive the latter in payment? Conceding that there was an agreement to take the indorsement in place of the money demand, the point that there was a restoration of that demand by the withdrawal of the indorsement through deception, remains unaffected by any such case.

It is again insisted, that the agreement to indorse the second note was void, by the statute of frauds. *Carville* v. *Crane*, (5 Hill, 483,) and *Gallager* v. *Brunel*, (6 Cow., 349,) are cited. Those cases establish that a parol agreement to indorse the note of another for goods purchased by him, is not the ground of an action. There was no original debt between the parties to the promise.

Again, it is urged that the plaintiff, as assignee, is not entitled to recover. First, because the assignment did not pass any interest which could be the subject of an action; next, that if there was any such interest, it was not assignable.

The assignment transfers all the claim or demand of Mattison against Keeler for borrowing money, and for a failure on his part to indorse the note. The indebtedness of Keeler, and the cause of action, claim and demand of Mattison are transferred. The instrument is ample to assign whatever the assignor could claim.

The case of *Zabriskie* v. *Smith*, (3 Kern., 322,) was a case of a cause of action solely arising out of deceptive representations of the standing and credit of a purchaser of goods. The cause of action rested exclusively upon the deceit. There was nothing of an independent liability from contract expressed or implied, or on any other account, except this; it was held not to be an assignable claim.

But a right of action for the conversion of personal chattels is assignable, (2 Kern., 622;) and I apprehend that whenever a right is vested in one, growing out of a contract of any nature, it is assignable; and if the assertion of the original right involves the establishing of fraud or deceit connected with the action, the right to prove this follows the right to the original cause of action, and vests in the assignee with it.

The counsel of the defendant raises one other point, that there was nothing upon which to go to the jury; that there was no conflict of evidence, no witnesses being called by the defendant, and there were only legal questions raised.

He cites *Barnes* v. *Devine*, (2 Kern., 18,) and some other authorities have been referred to. In the case of *Barnes* v. *Devine*, the unsuccessful party was the one who rested his case at the trial upon legal propositions alone, and omitted to request a submission to the jury. He was the mover there. In the present instance, the defendant's counsel succeeded in getting a dismissal on legal grounds. The plaintiff has a right to say, that in this case a verdict should have been ordered in his favor, or the evidence should have been submitted to the jury, and the motion of the defendant denied.

We think there must be a new trial, with costs to abide the event.

BOSWORTH, Ch. J., and MONCRIEF, J., concurred.

Ordered accordingly.

FISH, Plaintiff and Respondent, *v.* DE WOLF *et al.*, Defendants and Appellants.

Where a note, though valid in its inception and collectible by the payee, is transferred by the latter as security for a usurious loan, such transfer is illegal and void, and in a suit by the transferee against the maker, such usury, on being alleged and proved, is a defense.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 12; decided, May 14th, 1859.

THE questions of law arising on the trial of this action were there ordered to be first heard at the General Term. It was tried before Mr. Justice WOODRUFF and a jury, on the 9th of February, 1857. It is brought by James D. Fish, as first indorsee of

a note for $1,500, made by the defendants, Thomas L. De Wolf and Daniel Starr, composing the firm of De Wolf, Starr & Co., dated February 1, 1855, payable, as the complaint states, to "the Atlas Insurance Company or order," twelve months after its date. The complaint also avers that "the said payee indorsed and delivered the said note to the plaintiff" before its maturity, and that the plaintiff is the lawful owner and holder of it, and that it is due and unpaid.

The answer (1st) denies that the Atlas Insurance Company indorsed or delivered the note to the plaintiff, or that he is the lawful owner or holder of it.

2d. It avers that it was given to the Atlas Company in advance for premiums upon policies of insurance, to be thereafter issued under an agreement to that effect between the defendants and said Company; that policies were afterwards demanded and refused; that the note was without consideration in the possession of the Atlas Company, and was paid to the plaintiff without consideration; and that the Company was insolvent when the note was given, and now is.

3d. That it was without consideration in the possession of the Company, and was passed to the plaintiff at a usurious rate of interest and is void for usury, and that he took it with knowledge of the facts in relation to its origin.

George H. Tracy, a witness for the plaintiff, testified that he was Secretary of the Atlas Insurance Company, from in February, 1855, until its failure on the 5th of March, 1857. That an injunction was served on the Company on that day, and a receiver of the Company was appointed. That N. H. Osgood was President of the Company "when this note was transferred;" and that the indorsement upon it, "N. H. Osgood, Prest.," is his handwriting. It was then read in evidence, and was payable to "the Atlas Mutual Insurance Company or order."

On cross-examination he said: "The makers who made that note, I suppose, never received anything for it; they did not to my knowledge;" * * "I think the Company was solvent at the time the note in suit was signed; before this was due, the Company was in difficulty for want of immediate means in consequence of a large portion of its assets being locked up as a margin for loans, and it was known in the street;" * * "Mr.

Fish had given the Company subscription notes to the amount of about $8,000; he took out a good many policies of insurance from the Company; the Company were in the habit of borrowing money from him; they did so a number of times; they gave him their notes with subscription notes and premium notes as collateral security; the note in suit was a subscription note; I gave this note to Mr. Fish; the note was given to him as collateral for a loan made by him; the old loans were taken up and new loans made;" * * "the Atlas Insurance Company agreed to pay Mr. Fish, for the loans which he made to them, more than simple interest; they agreed to pay him for the loan for which he held this note more than simple interest; they paid him as high as 1½ per cent a month."

When the plaintiff rested, the defendants moved to dismiss the complaint, on the ground, among others, "that the evidence shows that the note was given as collateral to a usurious loan, and therefore the plaintiff cannot recover. The motion was denied, and the defendants excepted.

Evidence was given by the defendants that they subscribed, in all, $5,000 upon a subscription of $200,000, taken up in February, 1855, and that the note in suit was given under said subscription; and they also gave evidence tending to show that after the making of the note in suit "it was agreed between the defendants and the Company (payees), while the Company held the note, that the amount of premiums paid by the defendants (on policies obtained from the Company after this note was made), though secured by new notes, should be applied on the subscription notes for $5,000, and those notes retired as premiums to the amount thereof respectively accrued; and that they subsequently paid such premiums to the amount of $1,890, and the jury specially found that such were the facts, and also found a general verdict for the plaintiff of $1,606.17, the amount of the note and interest.

The Judge was requested to charge the jury (*inter alia*) that if they "believed that the plaintiff held the note as collateral security to a usurious loan, the plaintiff was not entitled to recover." He refused to so charge and the defendants excepted.

No evidence was given upon the point whether the Atlas Insurance Company, or the Atlas Mutual Insurance Company, was or was not incorporated; or what was its true name; nor

was any given as to the business transacted by it, except such as is above detailed, and some other evidence of the same general nature.

When the jury had rendered their verdict, the Judge ordered the questions of law arising at the trial to be heard in the first instance at the General Term; that judgment be there first applied for, and that the entry of judgment in the meantime be suspended.

William Stanley, for appellants,

Contended that the transfer of the note in suit to the plaintiff, it having been made to secure a usurious loan, was illegal and void, (1 R. S., 772, § 5,) and gave to the plaintiff no title.

That the transfer was void, because not authorized by a previous resolution of the Board of Directors. (*Howland* v. *Myer*, 3 Comst., 290, and *Brouwer* v. *Harbeck*, 1 Duer, 114.)

C. C. Egan, for respondent,

Insisted that, as the note formed part of the capital of the Company, it had a consideration, under the statute, (1 S. C. R., 158; 1 Comst., 371; 4 id., 51;) and that, being free from usury in its inception, no subsequent transfer of it under a usurious contract could invalidate it in the hands of the indorsee; and that usury is a personal defense, and cannot be set up by a stranger. (*Mechanics' Bank* v. *Edwards*, 1 Barb., 278; *Post* v. *Bank of Utica*, 7 Hill, 391; *Livingston* v. *Harris*, 11 Wend., 329; *Warner* v. *Gouverneur's Ex.*, 1 Barb., 39; *Hammond* v. *Hopping*, 13 Wend., 505.)

HOFFMAN, J. The first question is, What is the legal character and position of the Atlas Mutual Insurance Company? Have we, at General Term, on this case, a right to treat it as a corporation? If so, what is its charter? where are we to look for it?

There is not a word of allegation in the pleadings, nor of suggestion in the testimony, of its being an incorporated Company. The complaint and answer do not speak of the Atlas Mutual Insurance Company, but of the Atlas Insurance Company. The former name appears nowhere in the Case, except in the promissory note given in evidence.

If it was of importance to the plaintiffs, or to the defendant, that the fact of an incorporation should appear, it should have been pleaded, or proven; and if proven, perhaps an amendment might be required and allowed. But if no pleading was necessary—if it was simply matter of evidence, which either party might adduce, to sustain his case, we are left without proof; without anything to show the charter or any of its provisions.

As the case is now presented, how is the General Term to know what powers the alleged corporation possessed; what was the authority of its officers; to what provisions of any general statute it was subject?

It is said that the point, that this was not proven to be an incorporated Company, was not raised at the trial; that the action was tried upon the theory that it was one; that it may have been admitted, not only that this was an incorporation, but that its charter was that which is now proffered to us at General Term.

No doubt there are many cases in which a party who does not suggest an objection at the trial, which, if then suggested, could have been met, will be precluded from raising it in the Court above.

Thus, where, upon a bill of exceptions, two questions were raised at the trial upon powers contained in a will, viz., that the executors had not a power of sale, and that it was badly executed if they had; another point, that the consideration in the deed given under the power was merely nominal, could not be taken on appeal. (*Meakings* v. *Cromwell*, 1 Seld., 136.)

So in *The Farmers' Loan and Trust Company* v. *Curtis*, (3 Seld., 466,) a deed was executed by one Redfield for himself and as attorney of Jacob Le Roy. The deed was a piece of the evidence in the cause. For the first time, it was objected on the appeal that there was no proof of Redfield being in fact the attorney of Le Roy. The Court would not allow the objection to be considered. It might have been obviated by evidence, if taken at the trial.

In *Ingraham* v. *Baldwin*, (12 Barb., 9,) the question as to the validity of a mortgage arising, a point was, that the mortgagor ought to have been shown to have been twenty-five years of age at its date. (2 R. S., 545, § 1.) The point was first raised on the argument of the appeal, and the Court refused to consider it. It could have been obviated at the trial.

In *Laimbeer* v. *The Corporation of New York*, (4 Sandf. S. C. R., 109,) upon a question of the validity of an assessment, an objection was taken on the appeal that the law required that the lots should be described by street numbers. It was answered, that the objection had not been taken at the trial, when it might have been shown that there were no street numbers.

See, also, *Sharp* v. *Whipple*, (1 Bosw. R., 557,) in which the general rule is stated.

Now, in these cases, there is not an entire want of proof of a particular fact. A presumption of the existence of the fact, as if it was legally proven, may be made from what does exist. The omission to object at the trial justifies this presumption. The fact of an actual consideration; the fact of a sufficient power of attorney; the fact of the mortgagor being twenty-five years of age; and the fact of there being no street numbers, were reasonable and fair assumptions from what was proven in each case. But how is it possible to say, that this Company was incorporated? How can we say, that such and such are the provisions of its charter?

The theory of the trial may as certainly have been that of a partnership, or association, under this title, as of a corporation. There is no word in pleading, testimony, rulings, or charge, which is irreconcilable with this view.

I shall, then, consider the case on the ground of this being a mutual association for the purpose of insuring, without any corporate privilege, and of whose internal regulations we are left almost wholly ignorant. We are informed that it had a President and Secretary, and a capital partly, at least, composed of premium notes given in advance.

1. The note was a subscription note to the capital of the Company, to be held as such. The defendants had given notes to the amount of $5,000, including the one in suit. The jury have found an agreement that premiums, even if paid by new notes only, should be applied on the subscription notes for $5,000, and such notes be retired for the amount so paid. They find, also, that the amount of premiums paid under this agreement was $1,390.

It is not shown where the other notes, part of the $5,000 subscription notes, were, at the time of the trial. It was not shown

that they were not outstanding. There is nothing to indicate, upon the facts or the law, that the plaintiff or the Company itself has not as full a right to have the premiums appropriated to some of the other notes, as the defendants have to insist upon their application to the note in suit. I think this point must be disposed of in favor of the plaintiff, on the verdict.

2. The next question is, whether the note was available in the hands of the Company, and was held by it on a sufficient consideration, so that the association, or one representing it, could have sued.

The instrument is a perfect negotiable note, importing a consideration on its face, given to a Company, or Association, not shown to be unauthorized to take it; and defendants have not shown that there was not a valid or adequate consideration for it. This they were bound fully to have proven against a holder before maturity. On the theory now proceeded upon, the point that the note was given to a corporation, and that a holder, must see to the title of that corporation, cannot arise. We have a Company, holding a negotiable note, with every presumption that it had a right to take and a right to transfer, with the legal presumption of a consideration, and that presumption not overthrown.

3. The next question of importance is as to the title of the plaintiff to sustain this action. The Judge was requested to charge that the plaintiff had not shown a legal title to the note, or right to sue thereon. This he refused to do, and an exception was taken.

We have, in the view now taken, the case of an association or partnership, with a President and Secretary of a promissory note given to the association, in its assumed joint style or name, and indorsed over to the plaintiff by the signature of its President, with delivery.

The general right of one partner to accept or indorse cannot be disputed. (Collyer on Part., 401; Chitty on Bills, 42; see *Davison* v. *Robertson*, 3 Dow P. C., 229; and the case of *Fleming* v. *McWair*, House of Lords, July 16th, 1812, there mentioned.)

Mr. Collyer says, (§ 1137,) "As between the Company, (speaking of a joint stock company,) it seems clear that a bill negotiated in the name of the Company by any one of the members will, in the hands of a *bona fide* indorsee for value, be available against

the whole body of proprietors, provided there is nothing on the face of the bill to show that it was drawn or accepted in an unauthorized manner."

There is a separate class of cases in which, members have been sought to be charged personally through the acceptance of one named as an officer or director. (*Bramah* v. *Roberts*, 1 Bingh. N. Cases, 469; *Dickinson* v. *Valpy*, 10 Barn. & Cres., 128.) Authority expressly given must generally be shown. But I apprehend that when a note is indorsed over for value, when the money goes to the use of the association, when the President indorsing has the note in possession and delivers it, a presumption of membership and power is sufficiently raised.

4. The next question we shall consider is of considerable moment. The Judge was requested to charge that if the jury believed the plaintiff held the note as collateral security to a usurious loan, the plaintiff was not entitled to recover. A refusal so to charge was excepted to.

The answer set up the defense that the note was negotiated and transferred by the Company at a usurious rate of interest; that it was discounted and purchased by the plaintiff at or about the rate of eighteen per cent per annum, and was void for usury.

The proof tends to establish loans, in general, by the plaintiff to the Company at usurious rates; and that the loan for which he took this note as collateral, was upon usurious interest.

I think that under the rule in *Catlin* v. *Gunter*, (1 Kern., 368,) the evidence of the usury, in the transaction between the plaintiff and the Company, was properly in the case, and could have been submitted to the jury.

But it is insisted that these defendants cannot set up as a defense to their note, which was good in its inception, usury in a loan made to the payees of the note, for which it was transferred as security merely.

The old case of *Bush* v. *Livingston* decided that a lender of money upon usury, who took an assignment of a mortgage as security which was perfectly valid between the parties, was not barred from sustaining a bill of foreclosure. (2 Caine's Cases in Error, 66.)

This doctrine was distinctly affirmed in *Pearsall* v. *Kingsland*. (3 Ed. Ch. R., 195.)

But in these cases, being both in Chancery, the Court allowed only the recovery of the amount actually advanced by the lender, with legal interest.

In *Wells* v. *Chapman*, (4 Sandf. Ch. R., 312,) this point was much pressed. The Vice-Chancellor so far recognized it as to hold that the good mortgage was not so affected by usury and illegality in its transfer to the Life and Fire Insurance Company, as to prevent its being restored to full force, when the original pledgors discharged the debt, and took it back.

When the case was before the Supreme Court on appeal, (13 Barb., 562,) the Court recognized the rule of *Bush* v. *Livingston* and *Pearsall* v. *Kingsland*, to the fullest extent. (See also *Warner* v *Gouverneur's Executors*, 1 Barb., 39.)

There is also a class of cases in which it is held that if a security for money is originally free from usury, no subsequent agreement between the parties, by which usury is taken upon it, will render it void, and defeat an action. (*Ferrall* v. *Shaen*, 1 Saund., 295, and notes; *Nichols* v. *Lee*, 3 Anst., 940; *ex parte*, Jennings, 1 Mad. R., 331.)

Yet in *Bell* v. *Lent*, (24 Wend., 230,) the language of the Court is: "There was no sale of the notes, which distinguishes the case from *Cram* v. *Hendricks*. The money was advanced by way of loan, upon usurious interest, and the notes were transferred simply as collateral securities. The collateral paper must abide the fate of the principal debt for which it was given; that being affected with usury, the whole is void as against these defendants."

The notes were made by one Faulkner, not a party to the suit. They were indorsed by Lent, by the firm of Eddy & Chubb, and by McIntyre. These parties were sued, except Chubb, who was dead. The notes were sent to New York to procure them to be discounted on account of Eddy & Chubb, and of McIntyre, and were so discounted at a usurious rate. Thus, as to Eddy and McIntyre at any rate, the usury was between the lender and the party sued upon the notes. Lent, however, was not affected by this consideration.

In *Dean* v. *M.* and *F. Howell*, (Lalor's Supp. to Hill & Denio, 39,) the defendants made a note for $3,000, in favor of D. R. Minor, who indorsed it. Minor borrowed $2,000 on his own check, and gave the note as security, through a broker. The

note was a lent note, and the broker informed the lender of this. The Court says that the lender took the note, knowing it was void in its inception.

The case of *Gaither* v. *The Farmers and Mechanics' Bank*, (1 Peters' U. S. R., 37,) must be admitted to be a direct authority to the point, that the lender on usury, who has received a valid promissory note as collateral to his loan, cannot sustain an action upon such note. The maker is not relieved from paying the note entirely. He is only relieved from paying it to that holder. The case was governed by the law of Maryland, and the statute of that State is not different from our own.

The case of *Harrison* v. *Hannel*, (5 Taunt., 780,) is referred to by the Supreme Court, and is strong upon the same point. The good security may not be recovered upon by the usurious holder, because it is given for enforcing a usurious contract.

Dewitt v. *Brisbane*, (16 N. Y. R., 512,) applies the same principle, with great force, to the case of a transfer of a good security upon a contract which was in violation of the restraining act. The party to the violation of the law cannot acquire a legal or equitable right to enforce payment of the valid security, transferred upon the illegal transaction.

The line of cases referred to, such as *The Mechanics' Bank* v. *Edwards*, (1 Barb. R., 272,) is where usury existed in the instrument proceeded upon, and particular persons were not allowed to set it up.

The authorities I have first cited were all in a court of equity, and may well be placed upon its peculiar doctrine as to usury. I consider the rule to be, that the usurer cannot sue at law upon a valid note given to him as collateral merely, when he could not sustain an action against the principal for the debt.

From the statement of the learned Judge who tried the cause, after referring to his minutes, it appears that the case, as the parties have made it, presents the evidence as to usury far stronger, than he had noted it. In his view there was not enough to go to the jury upon the point. The case, as agreed upon, must control our action, and we think the evidence entitled the party to have the question submitted.

On this ground, I think, there must be a new trial.

It cannot escape observation, that when the fact of incorporation is established on the new trial, some questions not now discussed will arise, especially the important one as to the operation of the statute of 1850, upon the question of usury.

BOSWORTH, Ch. J., and MONCRIEF, J., without considering the other questions discussed, concurred in granting a new trial on the ground that the transfer to the plaintiff was made to secure a usurious loan.

Judgment reversed and new trial granted, with costs to abide the event.

SAMUEL G. OGDEN, JR., Plaintiff and Respondent, *v.* CHARLES ANDRE, CHRISTIAN ANDRE and GEORGE ANDRE, Defendants and Appellants.

1. A person who, in good faith, lent money to the International Insurance Company, on the transfer of its subscription notes as collateral security, amounting in the aggregate to over $1,000, without notice of any fraud affecting the origin of such notes, or that they were transferred without any previous resolution of the Board of Directors of such Company, is entitled to recover upon them, although they may have been procured from the maker by fraud, and although there may have been no such resolution authorizing the transfer.
2. The fact that the plaintiff took the transfer directly from the Company, is not, *per se*, constructive notice of the non-existence of such a resolution.
3. Nor is it a defense that the collaterals, when thus transferred, were not indorsed by the then President of the Company, they having been actually indorsed previously for the purpose of making them negotiable, by the then President, and he being the proper officer to make such indorsements.
4. Where the defense is that the Company, at the time of such transfer, was insolvent, the Judge may, in his discretion, require some evidence of notice thereof to the indorsee, or that he took the notes in bad faith, to be first given; and it is not error to exclude proof of such insolvency, when the evidence given not only fails to justify the inference of bad faith, or notice of such insolvency, but, on the contrary, shows good faith, and an absence of any such notice or knowledge.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 12; decided, May 21, 1859.

THIS is an appeal by the defendants from a judgment against them, entered upon a verdict rendered upon a trial had before Mr. Justice SLOSSON and a jury, on the 27th of May, 1858.

The plaintiff sues as indorsee of a note, which, with the indorsements thereon, reads as follows, viz.:

"$1,000. NEW YORK, Dec. 1st, 1855.

"Twelve months after date, we promise to pay the International Insurance Company, or order, for value received, one thousand dollars.

(Signed) "ANDRE BROTHERS."

Indorsed: "For International Insurance Company, Alanson Marsh, President. Pay Phenix Bank, S. G. Ogden, Jr."

The complaint states that the defendants, on the 1st of December, 1855, being partners, composing the firm of Andre & Brothers, made the note in question and delivered it to the payees; that afterwards, and before its maturity, "the said International Insurance Company duly indorsed" the same; that it "was thereupon delivered to the plaintiffs;" that it is past due, and wholly unpaid, and prays judgment for the amount of the note, with interest from December 4, 1856.

The answer of the defendants admits that they made and delivered the note to said Insurance Company, but avers that it was given to the Company "as a memorandum for premiums of insurance in said Company, to be earned by said Company for insurance therein, to be effected by the defendants when they should desire, or, if they should desire, during the period of the year before the maturity of said note, and that the amount of said premiums should be credited upon said note as the said insurance should be made, and for the amount of the premiums therefor;" that at the time the note was made and delivered, the Company represented to the defendants that they were solvent and duly organized, with a large surplus, and were in good condition, and "that they only wanted said note as a memorandum of insurance;" that if the whole of the note should not be earned at its maturity, the Company would surrender it to the defend-

ants, on being paid the premium upon the amount of insurance actually effected; that, relying upon said representations, the defendants made and delivered the note; that, as matter of fact, the Company was insolvent when said representations were made and the said note was given, and was "not a duly organized Company, but a corrupt and fraudulent association, and the officers thereof, with their associates and the persons engaged in said Company, had combined and confederated together to defraud the community, and they well knew that they were unable to pay any losses," and did not expect or intend to pay any when said note was obtained; that soon after the note was given the Company failed, and was closed up, on account of its insolvency and the fraudulent manner of its organization; that the premium on the whole insurance effected by the defendants with said Company, amounts to only $212.12, which sum the defendants offer to pay, with costs, on the note being surrendered to them.

It avers that the plaintiff is not a holder of the note in good faith and for a valuable consideration.

For "a further and separate answer," it denies that said Company "ever indorsed or delivered the said note to the plaintiff;" but avers "that the said note was, without any authority and fraudulently, indorsed and delivered by the President of said Company to the plaintiff as collateral security for a preëxisting debt of the said President."

It also denies "that the plaintiff is the lawful owner and holder of said note."

At the trial, "the charter of the International Insurance Company," as the case states, was read in evidence, but it is not printed as a part of the case.

It was proved that Charles W. Ogden was Vice-President of said Company from October 29, 1855, to March, 1857; and that Alanson Marsh was President from September 15th, 1855, to February 2d, 1856, when Moses Starbuck succeeded him as President.

Charles W. Ogden, a witness for the plaintiff, was asked, "by what officer of the Company were the notes of the Company indorsed?"

The defendants objected to this evidence, and to evidence that Marsh, the President, indorsed the note, unless it was first shown

that he "had special authority from the Company to transfer the note, and that such transfer was authorized by resolution of the Board of Directors." The objection was overruled and the defendants excepted. The witness answered, "By the President." He then proved the indorsement upon the note, and it was read in evidence.

It was further proved that the note, with others of a like description and similarly indorsed, amounting in all to $18,000 or $19,000, was transferred to Samuel G. Ogden, father of the plaintiff, as security for a loan of $15,000, made by him to the Company, and paid to the Company at the time of the transfer of the collaterals.

That prior to such loan and transfer, and previous to February 6, 1856, this note was lodged as collateral with Krollpfeiffer & Borott, while Marsh was President, as security for money obtained from them, and was then indorsed by Marsh as President; that it was taken up by the Company on the 6th of April, 1856, and subsequently transferred (as above stated) to S. G. Ogden, by Starbuck, who was at that time President. That there was no resolution of the Board of Directors authorizing the transfer to S. G. Ogden. That the defendants, after they made the note in question, took an open policy from said Company, the premium on which was $1,001.25; and that "under that policy there was $200 or $300 earned, marked off and charged against this note;" that the defendants never paid any money on it.

When this evidence had been given the plaintiff rested, and the defendants moved for a nonsuit, on the grounds: First. That the transfer of the note in suit was unauthorized by a previous resolution of the Board of Directors of the Company. Second. That the note was not indorsed by the Company, nor by the President of the Company in office at the time of the transfer to S. G. Ogden. The motion was denied and the defendants excepted.

The defendants offered in evidence a judgment of the Supreme Court "in proceedings taken by the Attorney-General of this State, declaring said International Insurance Company insolvent, and dissolving the same, which judgment was entered on the.... day of..........., 18..."

The evidence was objected to as irrelevant, and excluded, and the defendants excepted. It was subsequently admitted "that Mr. Scudder was appointed Receiver of the International Insurance Company, November 1st, 1856, by an order of the Supreme Court, in proceedings instituted by the Attorney-General."

Charles Andre, one of the defendants, testified, that before the note in suit was made, Mr. Del Banco came to the defendants' office, and said "this Company had a cash capital of $100,000; that they were going to enlarge it by subscription notes to the amount of $500,000, and asked me to be a party to those subscriptions; we signed a book that Mr. Del Banco had in his possession containing the terms of the subscription; he said that he was not then an officer of the Company, but as soon as those subscriptions were taken, he would be made Secretary."

"We subscribed $1,000, telling him that we had taken out some policies in other companies, and that we probably would not use that amount for some time to come; Mr. Del Banco then said that if we should not use the premiums, and the note became due, then on paying what amount we might have taken, and if no premiums had been earned, the note would be returned without payment; the Company sent us that note and we signed it, believing that all the notes had been given."

On cross-examination, the subscription book signed by the witness was identified by him, and was read in evidence, as follows, viz.:

"We, the undersigned, hereby subscribe the several sums set opposite our respective names as an additional capital stock of the International Insurance Company, said subscriptions to be paid for in our notes at twelve months, and to be insured out in premiums by us, upon condition—

"1. That this subscription shall be binding when the sums subscribed amount to at least one hundred thousand dollars, approved by the Board of Trustees.

"2. That Edward Richardson shall be President, and Chas. W. Ogden Vice-President, and A. B. Van Olinda Secretary of said Company.

"3. The said Company shall pay us a commission of five per cent for advancing our said notes upon the payment thereof.

"New York, October 9th, 1855."

It appeared that Del Banco was subsequently appointed Secretary of the Company, and was afterwards removed.

David E. Wheeler, one of the Commissioners appointed by the Comptroller, in "1856, to examine into the condition of all the Insurance Companies in the city," gave evidence tending to show that the condition of said Company "was bad;" that "it had a large quantity of worthless securities, and a large amount of debts, with nothing to pay them with;" that "there was a large amount of notes as assets, the makers and indorsers of which could not be found."

Morris Hollander gave evidence tending to show that Del Banco requested him, in December, 1855, to give a subscription note to said Company, and represented it to be a first-rate Company, with a cash capital of $200,000.

Alanson Marsh testified that, during his presidency, the Company had enough securities to pay, and did pay, its losses. "There were, probably, $50,000 of notes when I came in; I did not see the first nominal subscriptions; I saw the $50,000 of notes." He was then asked these questions, (found at folios 46 and 48 of the Case,) viz.:

"*Q.* What became of the $50.000 of notes?"

"*Q.* How much money had the Company when you became President, September 15, 1855?"

"*Q.* Was the $50,000 taken from the Company by its officers, shortly after you became President, without paying the Company any valuable consideration therefor?"

These questions, as they were severally put, were objected to and excluded, and the defendants excepted.

He further testified that, in December, 1855, the Company had, of premium notes, some $80,000 or $90,000, which were considered good.

Charles W. Ogden testified thus: "I communicated to S. G. Ogden the result of my knowledge as to the condition of the Company; I told him the Company was doing a good business; had many of the best subscribers, and was in need of money on the subscription notes to pay losses; he agreed to advance the amount of money; I was present at the negotiation: it was conducted by Starbuck; I told S. G. Ogden that this note of defendants was a subscription note."

The evidence being closed, the Judge charged the jury as follows:

"If you shall find that this note was transferred to Ogden, Sr., for money advanced at the time, and without notice of the fraudulent representations alleged to have been made to the defendants, to induce them to make the note, the plaintiff is entitled to recover, notwithstanding you may find that such representations were made, and were false.

"If you shall find that such representations were not false, or were substantially true, the plaintiff is entitled to a verdict.

"The elder Ogden having been shown to have advanced $15,000 on the pledge of this and other securities, the burden of showing notice of the fraud, if any, rests on the defendants.

"This note formed part of the capital stock of the Company, and the defendants are liable for the full amount of the note, though only $212 of it has been earned, unless you find the fraud before referred to, and the elder Ogden's knowledge of it, when he made his advance and received the note.

"If the elder Ogden is not shown to have been a holder without notice, and if the fraud existed, the present plaintiff cannot recover, there being no evidence that he paid anything on the transfer of the note to him."

The counsel for defendants then excepted to the charge of the court, so far as it relates to notice of the fraud to S. G. Ogden, senior.

He also excepted to the charge that the plaintiff's recovery is not to be limited to the amount of the premiums earned, but must be, if at all, for the whole amount of the note and interest.

He also excepted to each and every proposition in the charge, except the last of said propositions.

He then requested the court to charge the jury as follows:

1. That if the note in suit was transferred by the officers of the Company in contemplation of insolvency, the plaintiff cannot recover.

2. That Ogden, senior, at the time he received the note, being informed that the note was a subscription note, is chargeable with notice of the terms of the subscription.

3. That the transfer of the notes, (the one in suit and the others,) amounting in the aggregate to more than $1,000, (about

$20,000,) was invalid for not being authorized by a resolution of the Board of Directors.

4. That Ogden, senior, receiving the notes directly from the officers of the Company, is chargeable with notice of the fact that the transfer was unauthorized by resolution of Directors.

5. That if Ogden, senior, knew of the insolvent condition of the Company, or had knowledge sufficient to put him on inquiry, the transfer to him was void, and the plaintiff cannot recover.

6. That the proof offered by the plaintiff is insufficient to show a transfer from the Company to Ogden. 1. There is no proof of authority of the President to indorse. 2. There is no evidence of a resolution authorizing such an indorsement as is made on the note, or such a transfer.

7. That the elder Ogden had notice sufficient to put him upon inquiry into the origin and history of the note.

The Court refused to charge according to either of said requests, to which refusal defendant's counsel excepted.

The jury found a verdict in favor of the plaintiff for $1,103.40, the amount of the note and interest.

Judgment having been entered on the verdict, the defendants appealed from it to the General Term.

P. Y. Cutler, for appellants.

The International Insurance Company was first chartered under an act to incorporate the Kings County Mutual Insurance Company, passed 15th April, 1844. (Laws of 1844, ch. 156, p. 229.)

The title of the Company was changed to the "International," by act of 11th April, 1855. (Laws of 1855, ch. 295, p. 505.)

In 1847, the act of 1844, granting the first charter, was amended. (Laws of 1847, vol. 1, p. 109.)

I. This Company never had a legal existence.

II. The note was taken in a mode and for purposes not authorized by the charter of the Company, and was an attempt to evade the statute. The act was at least *ultra vires*. *Vide* Utica Insurance cases. (*Utica Ins. Co.* v. *Scott*, 19 Johns., 1.)

III. The International Insurance Company is within the statutes as to moneyed corporations. (1 R. S., 589, pt. 1. ch. 18, tit. 2, arts. 1–8; *Gillet* v. *Moody*, 3 Comst., 479; *Talmage* v.

Pell, 3 Seld., 328; *Supervisors of Niagara* v. *The People*, 7 Hill 504; *S. C.*, 4 id., 20; 1 R. S., 598, § 61; *Gillet* v. *Phillips*, 3 Kern., 114.)

1. It was subject to all the general statutes of the State applicable to such corporations, whether passed before or since the General Insurance Law of 1853, except so far as such statutes may be inconsistent with the legislation as to this particular class of moneyed corporations. This has been repeatedly adjudged by the Court of Appeals. (See above cases, and *Sagory* v. *Dubois*, 3 Sandf. Ch. R., 488; *Leavitt* v. *Tylee*, 1 id., 207; *Brouwer, Receiver* v. *Harbeck*, 5 Seld., 589; *Gillet* v. *Phillips*, 3 Kern., 114.)

2. It was subject to the general statutes, entitled, "regulations to prevent the insolvency of moneyed corporations," and to secure the right of the creditors and stockholders. (1 R. S., 589, 598, §§ 51, 61, took effect January 1, 1828; *Gillet* v. *Moody*, 3 Comst., 479; *Talmage* v. *Pell*, 3 Seld., 328; *Gillet* v. *Phillips*, 3 Kern., 114; *Brouwer, Receiver*, v. *Harbeck*, 5 Seld., 589; *Leavitt* v. *Yates*, 4 Ed. Ch. R., 134; *Leavitt* v. *Tylee*, 1 Sandf. Ch. R., 207.)

3. It was within the general statute, entitled, "Of proceedings against corporations in equity, which authorizes an injunction to restrain the exercise of powers not granted, and proceedings for dissolution of insolvent moneyed corporations." (2 R. S., 777, took effect January 1, 1830; id., § 38; *Boisgerard* v. *The New York Banking Company*, affirmed by the Chancellor, 2 Sandf. Ch. R., 28; *Sagory* v. *Dubois*, 3 id., 466, 485; *Gillet* v. *Moody*, 3 Comst., 479; *Tracy* v. *Talmage*, in Chancery, before the Chancellor. The case in which the Receiver was appointed for the North Am. Trust and Bank. Co.)

4. It was within the general statute, entitled, "Of the general powers, privileges and liabilities of corporations;" the third section of which prohibits, in express terms, the exercise of any corporate powers except such as shall be expressly granted, or shall be necessary to the exercise of the express power. (See §§ 33 and 34; 1 R. S., 599; took effect January 1, 1828; *Talmage* v. *Pell*, 3 Seld., 328.)

IV. The transfer of the two notes to Ogden is absolutely void, because not authorized by a previous resolution of the Board of Directors. (1 R. S., 591, § 8; *Gillet* v. *Moody*, 3 Comst., 479;

Gillet v. *Phillips*, 3 Kern., 114; *Blunt* v. *Hanna*, Opinion, Vice-Chan.; Sandf. in Pamphlet; *Johnson* v. *Bush*, 3 Barb. Ch. R., 209; *Talmage* v. *Pell*, 3 Seld., 328; *Lessee of Clarke* v. *Courtney*, 5 Peters, 319; *Van Ness* v. *The Bank of the United States*, 13 id., 17, 21.)

1. This was a statute corporation, and was capable of exerting its faculties only in the manner which the law authorizes. (*Head* v. *The Prov. Ins. Co.*, 2 Cranch, 127; *N. Y. Fire Ins. Co.* v. *Ely*, 2 Cow., 678; *Phœnix Bank* v. *Curtis*, 4 id., 437; *Bank of Augusta* v. *Earle*, 13 Peters; *Bard* v. *Poole*, 2 Kern., 497, 501; 2 Kent, 290; *Williams* v. *Chester, &c.*, 5 Eng. L. & Eq. R., 497; *Vielie* v. *Osgood*, PAIGE, J., 8 Barb., 138; *Voorhees* v. *The Presbyterian Church, &c.*, id., 148, 149.)

And by the third section of the act it is provided that all the corporate powers shall be exercised by a Board of Trustees. (Act of 1844, see Sess. Laws, p. 229, § 3.)

2. Where a power is created or its exercise is regulated by statute the authority must be strictly pursued in all respects or the attempted execution will be void. (1 Story's Eq. J., §§ 96, 177; *Bright* v. *Boyd*, 1 Story R., 478; *Vielie* v. *Osgood*, 8 Barb., 133; *Voorhees* v. *Presbyterian Church*, id., 149; *Atkins* v. *Kinnan*, 20 Wend., 241; *Owings* v. *Hull*, 9 Peters, 607, 623; *Williams* v. *Peyton*, 4 Wheat., 79; *Thatcher* v. *Powell*, 6 id., 109; *Ronkendorff* v. *Taylor*, 4 Peters, 349; *Jackson* v. *Shepard*, 7 Cow., 88; *Jackson* v. *Esty*, 7 Wend., 148.)

3. This principle applies to every individual or body whose powers are given or regulated by statute. (Cow. & Hill's Notes to Phil. Ev., pp. 1288, 1289, 1290; Const. of 1846, art. 1, §§ 6, 7; *Sharp* v. *Johnson*, 4 Hill; *Sharp* v. *Speir*, id., 76; *Denning* v. *Smith*, 3 Johns. Ch., 332, 344; *Sherwood* v. *Reade*, 7 Hill, 431; *Powell* v. *Tuttle*, 3 Comst., 396; *Hawley* v. *Bennett*, 5 Paige R., 104; *Arnot* v. *McClure*, 4 Denio, 41; *Miller* v. *Hull*, id., 104; *Jackson* v. *Clark*, 7 Johns., 217; *Fitch* v. *The Commissioners of Highways*, 22 Wend., 132.)

4. And the like principle in substance applies to conventional powers. (*Fitch* v. *The Commissioners of Highways*, 22 Wend., 132; 1 Eq. J., § 97; 2 Denio, 61; Ewin's Appeal, 16 Penn. St. R., 266; *Doolittle* v. *Lewis*, 7 Johns. Ch. R., 45; 1 Sugden on Powers, 6 Lond. ed.; in Law Library, vol. 15, pp. 264, 268, 334, 341.)

V. It is obvious that the directors did not and could not delegate their powers to any officer of the corporation. (1 Sugden on Powers, 340, 341, 221, 225; *Gilles* v. *Bailey*, 1 Foster's R., 150; *Call* v. *Wades*, 16 Vesey, 27; *Pearson* v. *Jamison*, 1 McLean's R., 197; *Graham* v. *Gibbeson*, 10 Bing., 263; *Hawkins* v. *Kemp*, 3 East., 410; *Powell* v. *Tuttle*, 3 Comst., 396; *Thompson* v. *Schemerhorn*, 2 Seld., 92.)

VI. The plaintiff is not within the saving clause of the 8th section, for he is not a purchaser for a valuable consideration and without notice.

In the absence of a resolution, the officers have no authority to act in such a manner, and those who deal with the officers, without seeing that they have been duly authorized, act at the peril of acquiring no title, if there is, in fact, no resolution. (*Blunt* v. *Hanna*, opinion of Vice-Chancellor SANDFORD; *Doolittle* v. *Lewis*, 7 Johns. R., 45, 48; *Williams* v. *Peyton*, 4 Wheat., 77, 79, 80; Cow. & Hill's Notes to Phill. Ev., 1288; *Denning* v. *Smith*, 3 Johns. Ch. R., 344; *Wyman* v. *Hal. & Aug. Bank*, 14 Mass. R., 58, 63; *Salem Bank* v. *Gloucester Bank*, 17 id., 28, 29.)

VII. The transfer of the notes was void, because made by the Company when insolvent, or in contemplation of insolvency, with the intent of giving a preference to a particular creditor over other creditors of the Company, and the receiver is entitled to the property, for he represents both creditors and stockholders of the Company. (1 R. S., 4 ed., 115, § 9; 1 R. S., pt. 1, ch. 18, tit. 2, art. 1, p. 591, § 9; see also 1175, § 4; *Gillet* v. *Moody*, 3 Comst., 479.)

The Company was clearly insolvent when these assignments were made, and always had been so. (Wheeler's ev., and all the evidence.) It cannot be pretended that insolvency was not contemplated when this transaction occurred. As all men are presumed to intend the natural result of their own acts, it must be deemed that the officers of the Company by whom the transfer was made intended to create a preference in favor of a particular creditor. Insolvency actually existed.

VIII. The judgment is against law and evidence, and should be set aside with costs.

The several exceptions to the rulings of his Honor the Judge, were well taken.

Geo. W. Stevens, for respondent.

I. The Insurance Company was authorized by its charter to transfer the notes received by it for the payment of losses or otherwise. (Laws of 1844, p. 231, § 11.)

II. No previous resolution of the Board of Trustees authorizing the transfer of the note in suit was necessary. The silence of the Company amounted to a ratification of the acts of its officers. (*Howland* v. *Myer*, 3 Comst., 290; *Curtis* v. *Leavitt*, 15 N. Y. R., 15; *White* v. *Haight*, 16 N. Y. R., 310.)

III. The father of the plaintiff having advanced his money to the Company and received this note, (with others,) as security for his advances, was a holder in good faith, and for a valuable consideration, and his transferee, (the plaintiff,) has good title to the note. (*Curtis* v. *Leavitt*, 15 N. Y. R., 15.)

IV. The defendants having dealt directly with the Insurance Company, are estopped from denying the validity of its organization as a corporation. (*Palmer* v. *Lawrence*, 3 Sand., 161; *McFarlan* v. *Triton Ins. Co.*, 4 Denio, 392.)

V. There is no evidence that at the time of the transfer of the notes to the elder Ogden, the Company was insolvent, or contemplated insolvency, or that the transfer was made with the intent to give him the preference over any other creditor of the corporation.

Moncrief, J. It is proved, and there is no evidence tending to create any doubt as to the fact, that S. G. Ogden lent and advanced to the International Insurance Company $15,000 on the security of the note in suit, and of other notes. The money was lent, on an application made in behalf of the Company for it, and by its officers. The money lent was received by the Company, and there is no pretense that the loan has been repaid.

Whatever representations may have been made by Del Banco to the defendants to induce them to subscribe, and however false and fraudulent they may have been, there is not the slightest evidence that S. G. Ogden had any notice or knowledge of them, or the slightest reason to suppose they had been made.

On the contrary, he was told at the time of the application and loan, that "the Company was doing a good business; had many of the best subscribers, and was in need of money on the subscrip-

tion notes to pay losses; he agreed to advance the amount of money." The negotiation in behalf of the Company was conducted by its President, in the presence of its Vice-President, and the money lent was paid for the Company to its Secretary.

The evidence offered at folios 46–48, was doubtless offered to show, that the condition of the Company at the time the note was given, was such, that Del Banco's representations must have been both false and fraudulent. But it could not have tended to show, that S. G. Ogden knew or should have suspected that false representations were made to induce the giving of the notes.

Immediately following these offers and exceptions; testimony was given by the defendants, apparently with a view to show such notice to S. G. Ogden, as would charge the notes in his hands with the consequences of the fraud. This implies that the Judge, in his discretion as to the order of proofs, called for some evidence on the question of notice, as a condition, to allowing the defendants to show the Company's operations and condition, for the purpose of establishing the fraudulent character of Del Banco's representations.

The evidence thus elicited, (and which is in no way impaired by any other evidence given or offered,) established, that S. G. Ogden was not only a holder for value, but in entire good faith, without the slightest reason to suspect that any representations had been made to the makers of the note to induce them to give it.

There was no offer to show that S. G. Ogden had any reason to suppose there was no resolution of the Board of Trustees authorizing the transfer.

The fact that S. G. Ogden received the note from the officers of the Company, did not charge him with such notice, and the Court did not err in refusing to so charge. All dealings with a company are done with its officers.

Such a resolution is not, under all circumstances, indispensable to a valid transfer. In *Howland* v. *Myer*, (3 Comst., 290,) the plaintiff dealt directly with the officers of the Company, and that case decided the precise point, that the absence of such a resolution would not defeat a recovery.

The Company transacted this kind of business in this manner: This note had been previously transferred to Krollpfeiffer & Borott, under similar circumstances, while Marsh was Presi-

dent. The Company took it up, and subsequently transferred it to the plaintiff; and neither the defendants nor the Company can now object that it was negotiated with the indorsement of Marsh as President, instead of that of Starbuck, to give it negotiability. The indorsement was written while Marsh was President.

The note in suit, in respect to creditors of the Company, and in respect to persons taking it from the Company, in good faith, and in the usual course of business, is payable absolutely and in full. (*White* v. *Haight*, 16 N. Y. R., 324.) There is no error in the parts of the charge excepted to.

The first request to charge was properly declined. There is nothing tending to show that S. G. Ogden suspected the Company was insolvent, or contemplated reaching that condition.

The second request was also properly declined. The fact that a note is a subscription note, does not justify the inference that it was obtained by fraud, or was made on any conditions.

The third and fourth requests need no observations beyond those already made.

There was no evidence justifying such an instruction as the fifth request called for.

The views already presented show that the Judge should not have charged in conformity to the sixth request, and that the seventh does not state a tenable proposition.

The evidence contained in the case is meagre, and whatever doubts may be raised by a casual reading of some of the exceptions, we think it is established, without contradiction or doubt, that S. G. Ogden was a holder for value, paid to the Company itself, in good faith, without the slightest reason to suspect that the Company was not in a prosperous condition, or that any misrepresentations had been made to induce the defendants to give the note, or that the officers who transferred it to him were not acting under such by-laws and resolutions as were necessary to formal accuracy, and the creation of full and perfect authority to do the acts which they performed.

An insurance company, whose capital consists almost entirely of notes, having a long time to run, and which is called upon from time to time to pay losses, must, from the necessity of the case, procure some of its notes to be discounted, or obtain temporary loans on their credit. One mode is as unobjectionable as

the other in principle, and also in fact, if the money is procured at the same rates.

A resolution of the Company, adjusting a loss and directing its proper officer to pay it, would imply to a business man, without more specific instructions, a direction to obtain a discount or a loan.

In reference to such a transaction, the fact that no resolution was passed authorizing the transfer or discount of any specific notes, should not defeat the title of one who, in good faith, discounts it for, or loans money on its credit to the Company.

And unless we are not only at liberty, but are bound to disregard the decision in *Howland* v. *Myer*, (*supra*,) we must permit such a holder to recover. The Company, having received the $15,000 could not reclaim the note from Ogden without refunding the money.

And, as between the plaintiff and the defendants, the former, on the general principles of commercial law, is entitled to recover.

The judgment should be affirmed.

BOSWORTH, Ch. J., concurred in this opinion.

HOFFMAN, J. The charter of the International Insurance Company, which was produced in evidence, and is referred to by counsel on both sides, dates back to the year 1844, (ch. 156;) was amended in 1847, (ch. 113;) and the name was changed from The Kings County Mutual Insurance Company, to the present title, in 1855 (ch. 295). By the last act, the designation "of Brooklyn," as its locality, was stricken out, and the word "New York" inserted. In other particulars these amending acts are unimportant.

The Company received by the original act the general powers of a corporation given by the 3d title of the 18th chapter of part 3d of the Revised Statutes; and also authority to make insurances on dwellings, &c., against fire; and marine insurances upon vessels, &c.

Upon receiving applications for insurances to the amount of $100,000, the Company was to be organized. But no policy should be issued until the sum of $25,000 had been received, either for premiums or on the certificates which might be issued

under the 12th section of the act, or from the avails of notes authorized to be taken in advance for premiums, in and by the 11th section. (Ch. 156, § 11, Laws of 1844.)

By that 11th section, the Company, for the better security of its dealers, may receive notes for premiums in advance, of persons intending to receive its policies, and may negotiate such notes, for the purpose of paying claims or otherwise, in the course of business. On such portions of the said notes as might exceed the amount of premiums paid by the signers thereof, (at the period of the annual statement afterwards prescribed;) and on new notes taken in advance thereafter, a compensation might be allowed to the signers not exceeding five per cent per annum, and be paid from time to time.

The system pointed out in the 12th section, of certificates issued for money received, need not be considered in the present case.

The history of the legislation of our State, as to what is termed insuring upon the mutual principle, is given in detail by DENIO, Ch. J., in *White* v. *Haight.* (16 N. Y. R., 310.) The special charters granted with similar general features, and some particular modifications, down to the act of 1842 incorporating The Atlantic Mutual Insurance Company, are referred to, so far as to show the general regulation of the scheme. That act introduced a new feature, the one contained in the 11th section of the act, as to the present Company, and before stated at length. It was the 12th section in the charter of 1842. The learned Judge says: "The notes given under this 12th section have frequently been before the Courts, and it is perfectly well settled in the courts of original jurisdiction, and in this Court, that they are payable absolutely, and may be collected without any allegation of losses, and without an assessment."

1. The first, and a very important question is, whether the note was legally transferred and negotiated to Ogden within the provision mentioned.

In *Howland* v. *Myer*, (3 Comst., 290,) it was held that the statute did not restrict the Company to a negotiation for the purposes of payment merely. A Company might discount the note, and so apply its avails in discharge of losses. It might transfer a note to the claimant of a loss. In a word, any *bona fide* settle-

ment of a presumed loss, contingent or absolute, made with the dealers of the Company in the usual course of business, was authorized.

In *The Central Bank of Brooklyn* v. *Lang*, (1 Bosw., 202,) the proof was of a delivery of the note sued upon, with several other notes, to the plaintiffs, who discounted them, and the proceeds were paid to the Insurance Company which had received them, to be applied to their general business purposes.

The proof here is of an actual loan by Ogden of $15,000, to the Company, on a transfer of this and other notes; that he was informed the notes were subscription notes, and that a discount was wanted to enable the Company to meet its losses. I think the proof warrants us in holding that Ogden took the notes ignorant of any intended misappropriation, and was authorized to consider that the transfer was for a legitimate purpose.

The next point of importance relates to the authority of the President, Marsh, to indorse the note, so as to transfer the title of the Company to the plaintiff through S. G. Ogden, the elder.

The complaint alleges an indorsement by the Company. The answer puts this allegation distinctly in issue. The testimony is, that the notes of the Company were indorsed by the President. All the notes given to Ogden were indorsed by him. The note in question had been previously indorsed by Marsh, and lodged with Krollpfeiffer and Borott for money received by them, and had been taken up by the Company before the transfer to Ogden.

In *The Central Bank of Brooklyn* v. *Lang*, (*ut supra*,) the complaint averred the making of a note in favor of the Company, its indorsement by the Company, and an offer of it, with other notes to the plaintiffs, who discounted them in the regular course of business. These allegations, by not being denied, were admitted by the answer. The note was indorsed by the Vice-President.

In *The Marine Bank* v. *Clements*, (3 Bosw., 600,) the note was precisely in the form of the note in the present case, except being payable at the Bank of Commerce. It was to the same Company, and was indorsed by Marsh, the President. The allegation in the complaint of an indorsement by the Company was expressly put in issue by the answer, and it was therein averred, that the

note was indorsed, without a resolution of the Board, by the President, when the Company was insolvent, and to give a preference to the transferree, a creditor.

No resolution of the Board was proven, no by-law conferring authority on the President, no evidence that any notes belonging to the Company had ever been negotiated and indorsed by the President, or that this had ever been done with the knowledge of the Directors, was produced.

It was held, that the title of the Company had not been divested. It could only be by a transfer by some person authorized to indorse it in the name of the Company, or who had been held out by the Company as so authorized. This could be evidenced by his acts, and the usual practice of the Company. His office of President by itself showed no such power.

In *Howland* v. *Myer*, (*ut supra*,) both usage of the Company and its by-law in the case, were held sufficient to show authority in the President to indorse the note.

See also *Partridge* v. *Badger*. (25 Barb., 146.) I think that the evidence in the present does sufficiently prove a usage, for the President to indorse and negotiate the notes, sanctioned by the Company.

There was no evidence in the case, and none offered to show that Ogden had reason to suppose there was no resolution of the Board for the transfer. The fact of his dealing with the officers is not enough to charge him with such notice, and the Court did not err in refusing so to charge.

3. No objection founded upon the original, irregular or unlawful or fraudulent organization of the Company, can now avail the defendants. They recognized it, subscribed to its stock, dealt with it, gave the present note to it by its name, and that note has gone into the hands of a holder for value without notice proven to have been possessed by him of any such matters. (*Palmer* v. *Lawrence*, 3 Sandf. S. C. R., 161.)

4. The learned counsel of the defendants insists, that the transfer of the note was void under the 8th section of the act "to prevent the insolvency of moneyed corporations," because it was a transfer of effects exceeding in value $1,000, and was not authorized by a previous resolution of the Board of Directors, (1 R. S., 591, § 8,) and that the plaintiff is not within the exception con-

tained in such section, not being a purchaser for a valuable consideration without notice.

Justice COMSTOCK, in *Curtis* v. *Leavitt*, (15 N. Y. R., at p. 46,) says, that some of his brethren were of opinion that the holders of the securities in that case were purchasers within the act. They were pledgees of the bonds secured by a transfer of corporate assets. He says that he does not dissent from those views. Justice BROWN deems it needless to pass upon it, but plainly leans in its favor. Justice SHANKLAND supports it, (p. 138,) and Justice PAIGE is extremely clear and decided upon the point (p. 192). In *Howland* v. *Myer* the plaintiff took the title from the President on account of his claim for a loss.

In *Palmer v. Yates*, (3 Sandf. S. C. R., 137,) it was held, that any person who, for what the law holds a valuable consideration, has acquired a title, whether legal or equitable, by an assignment or transfer from a moneyed corporation, is to be deemed a purchaser within the meaning of the act, and this whether the assignment is made absolutely or as a collateral security.

It appears to me to be a well warranted proposition, that a party who advances money for the use of a corporation of this description and receives from it as collateral security notes taken and held as this note was, is a purchaser for valuable consideration within the exception in the 8th section, and is protected, unless it is affirmatively proven that he had notice of a want of a previous resolution. (See also *Leavitt* v. *Blatchford*, 17 N. Y. R., 521.)

As to that notice, Mr. Justice PAIGE considers that it should be as clear and certain as that which is necessary to break in upon the registry acts. (*Curtis* v. *Leavitt*, 15 N. Y. R., 192.)

In *Palmer* v. *Curtis*, (*ut supra*,) it was held that there was no implication of knowledge, or duty to inquire, in an ordinary purchaser, although there might be in a director or officer. The omission to inquire was not sufficient. There must be, as a general rule, actual notice of the want of a resolution.

There is no evidence in this case sufficient to establish that Ogden had any notice of the want of a resolution.

It is not necessary to consider the important suggestion of Justice GARDINER, in *Howland* v. *Myer*, that if the 8th section is in conflict with the provisions of the charter, it must yield.

5. The next point is that the transfer was within the 9th section of the statute avoiding such transfer, when made in contemplation of insolvency, giving a preference to creditors. (1 R. S., 591, § 9.)

By section 61st of article 3d, (1 R. S. 598,) this Company was a moneyed corporation within the statute. By section 17th of its charter, sections 19 to 25, inclusive, were declared inapplicable to it.

But Mr. Ogden, the party from whom the plaintiff got his title, did not occupy the position of a preëxisting creditor. He created a debt from the Company to himself directly, by advancing his money on the faith and pledge of these notes. (*Leavitt* v. *Curtis*, *ut supra.*)

6. Another point raised is as to the effect of the representations of Del Banco which induced the defendants to subscribe, and which it is alleged were false and fraudulent.

The Judge charged that if Ogden received the note for money advanced at the time, and without notice, then, although the representations were fraudulent and false and influenced the defendants, the plaintiff could recover.

The Jury had no evidence before them on which to found a verdict of Ogden's knowledge of the fraudulent statements having been made. Whether then, they concluded that the defendants had been misled or not they were equally warranted in finding their verdict, Ogden being found ignorant of the false statements, and the charge of the Judge on this point we think was right.

Questions were asked by the defendants' counsel tending to show an abstraction of a large amount of assets of the Company by its officers for their own use (folios 46, 48). The effect of such proof would be to support the allegation of the false statements of Del Banco, or to show the actual insolvency or rottenness of the Company. But if Ogden did not know of the statements, and did not know of the insolvency, he could not be affected. As to the latter, the Company was represented to him to be in a good condition, and nothing forces knowledge of its actual state upon him.

The judgment must be affirmed.

Judgment affirmed.

CASES OF PRACTICE

AND

DECISIONS IN SPECIAL PROCEEDINGS,

AT THE

GENERAL AND SPECIAL TERMS

AND AT CHAMBERS.

McCULLOUGH, Plaintiff and Respondent, *v.* COLBY *et al.*, Appellants.

1. Where an action is brought by a judgment creditor against the debtor and his grantee of real estate, to set aside the deed as fraudulent and void against creditors, the complaint cannot be amended so as to allege that after the service of the summons and complaint upon the debtor (the grantor), an execution was issued upon the judgment, although it was issued before the summons and complaint were served on the grantee.
2. Nor can that fact, when it occurs at such a stage of the action, be made a part of the case by supplemental complaint.
3. When all the facts stated in a complaint, assuming them all to be true, will not entitle a plaintiff to any relief, a fact essential to the cause of action and occurring after the service of the summons and complaint on one of the defendants, cannot be incorporated into the complaint by amending it, nor be made a part of the case by a supplemental complaint.

(Before BOSWORTH, Ch. J., and HOFFMAN, SLOSSON, WOODRUFF, PIERREPONT and MONCRIEF, J. J.)

Heard, May 14; decided, May 28, 1859.

THIS is an appeal from an order allowing a supplemental complaint to be filed, and vacating a previous order allowing the original complaint to be amended.

The action is brought by the plaintiff as a judgment creditor of John L. Colby by judgment recovered March 27, 1857, to set aside a deed of land executed by John L. to Mary Ann Colby,

on the 24th of November, 1855, as fraudulent and void as against the creditors of John L.

The original summons and complaint, (the latter being verified April 2, 1857,) named John L. Colby, Mary Ann Colby, George S. Fox and Joseph Walker, executors, &c., as defendants.

Fox and Walker were made parties because they, as executors of Joseph Leggett, deceased, held a mortgage of this property executed by the said Mary Ann on the 23d of June, 1856.

All of the defendants, except Mary Ann Colby, were served with the summons and complaint on the 4th of April, 1857, and said Mary Ann was served with copies thereof on the 6th of May, 1857.

The said John L. put in a separate answer on the 22d of April, and the said Mary Ann also put in a separate answer on the 23d of May, 1857.

The complaint did not aver that any execution had been issued on the judgment.

The action came on to be tried on the 24th of March, 1859, and the omission of this allegation being suggested to be a fatal defect, the plaintiff, by order, was allowed to amend, and did amend his complaint, by alleging simply that an execution was issued on the judgment on the 11th of April, 1857.

An answer was interposed to such amendment, admitting that an execution had been issued on said judgment on said 11th of April, and averring that this action was commenced prior to that date.

Subsequently an order was made allowing the plaintiff to file a supplemental complaint stating the same matter, as had been inserted as aforesaid by way of an amendment of the original complaint, and vacating the order allowing the original complaint to be amended.

From that order the present appeal is taken. The grounds urged in support of the order are stated in the opinion of the Court.

William Curtis Noyes, for appellants.

E. W. Stoughton, for respondent.

BY THE COURT—BOSWORTH, Ch. J. This appeal should not be determined on the assumption that John L. Colby is not only not a necessary party, but that the rights of the parties may be regarded as if he was not in fact a party.

Whether a necessary party or not, it is not denied that he is a proper party. Nor can it be denied that he may be charged with the costs of the action, (if the plaintiff succeeds,) as a party to the fraud charged in the complaint.

There is, then, a suit, in which the plaintiff has issued a summons against the persons named in it as defendants. He has declared against all of them as defendants. That complaint was verified on the 2d of April, 1857, and the summons and a copy of that complaint were served on John L. Colby on the 4th of that month, and on Mary Ann Colby on the 6th of May, 1857.

If, on the facts stated in the complaint, no cause of action exists against either defendant, and if no relief can be granted against either of them on those facts, then it is well settled that facts occurring after suit brought cannot, either by amendment or by supplemental complaint, be made a part of the plaintiff's case, nor will they enable him to maintain the present action.

It is conceded, that if the facts stated in the complaint do not constitute a cause of action, no cause of action existed in favor of the plaintiff against either defendant, when the summons and complaint were served on John L. Colby. The further facts, which, with those stated in the complaint, are essential, in this view, to constitute a cause of action against either defendant, occurred on the 11th of April, 1857. These facts cannot be inserted in the complaint, by an amendment, so as to affect John L. Colby. Facts occurring after suit brought cannot, under any circumstances, be incorporated into a complaint by way of amendment, nor can they be brought before the Court by supplemental complaint, when the original complaint states no cause of action. No party can recover in an action which was commenced when the cause of action had not accrued.

It is contended, however, that the action was not commenced as against Mary Ann Colby until the 6th of May, 1857; that John L. Colby is not a necessary party; and that as to her, the present appeal should be decided, as if he was not in fact a party. To this view, it may be answered,

1st. That John L. Colby is an actual party, and is a proper, if not a necessary party. The action had been at issue as to him nearly two years, when the order appealed from was made, and that order leaves him still an actual party to the action.

2d. Such a theory converts the action into as many several actions as there may be defendants who were served on different days; at all events, into two several actions, although commenced and still pending as a single action, and although brought to convict John L. and Mary Ann Colby of a joint fraud, and to obtain against each and both of them the relief, to which proof of that fact would entitle the plaintiff. A part of the relief that may be granted is a judgment against John L. Colby for the costs of the action.

3d. When a complaint against several persons, as defendants, has been served on one of them, and especially when it has been served on a defendant who is charged in it as being one of the principals in a fraudulent transaction, which it is the sole object of the action to avoid, *that* is the complaint of the plaintiff (until it is amended) against all the defendants. Facts which occur after such a complaint has been so served, are facts "occurring after the former complaint," within the meaning of these words, as used in section 177 [152] of the Code. They cannot be set up by a supplemental complaint, if the former complaint would not, (assuming all the facts alleged in it to be true,) entitle the plaintiff to any relief against either defendant.

4th. Section 99 of the Code only declares when an action is commenced against each defendant, so as to preclude his setting up the statute of limitations as a defense. Within the meaning and object of this provision, the present action was not commenced against Mary Ann Colby until the 6th of May, 1857. The action then commenced against her was not one in which she was the sole defendant, but was one in which she and John L. Colby and others were defendants, and one in which the plaintiff's complaint existed as a pleading regularly made in it; and as a pleading which had been made as early as the 2d of April, 1857, and which, from that time until some time in March, 1859, was the only complaint in the action, and the only pleading therein on his part.

A complaint may be filed before the summons is served. In such a case, the summons must state where the complaint is filed. (Code, § 130.) Had it been actually filed, when the summons was served on John L. Colby, we think it must have been conceded, that from the time of such service, it was a pleading of the plaintiff in the action duly filed of record; and that facts occurring subsequently thereto could not be incorporated into the complaint by amendment, or be brought before the Court by supplemental complaint, when the complaint filed stated no cause of action; any more than after bill filed, and the service of a subpœna to appear and an answer, on one of several defendants, the bill could be amended or a supplemental bill could be filed, stating facts which occurred after the bill was filed, when upon the bill itself no relief could be granted.

So after complaint filed, in an action like the present, a notice of the object of the action may be filed, to affect subsequent purchasers of the property, who might purchase *pendente lite.* Such a notice, to be effective, must state the names of the parties to the action. (Code, § 132.) If one had been filed, stating Mary Ann Colby to be the only defendant, it probably would not be effective for any purpose.

We think it quite clear that the facts originally inserted in the complaint, by way of amendment, could not be made the subject of such an amendment. They did not exist when the summons and complaint were served on all of the defendants, except Mary Ann Colby. As to them, these facts cannot be said to be facts which existed when the former complaint was made, and of which the plaintiff was then ignorant. As against those defendants, they cannot be alleged by way of supplemental complaint, because the complaint itself does not state facts enough to entitle the plaintiff to any relief. And it is only when a complaint states facts entitling a plaintiff to some relief, that facts subsequently occurring and material to the case, (and material because they affect the nature or extent of the relief to which the plaintiff, but for them, would be entitled,) can be set up by a supplemental complaint.

The facts stated in the supplemental complaint occurred "after the former complaint," and therefore the plaintiff could not set them up in this action as against Mary Ann Colby. The com-

plaint, from the time of its service on John L. Colby, was as absolutely a pleading in the action against her as against him.

For the purpose of determining whether a cause of action existed when the action was commenced, it must be deemed to have been commenced on the 4th of April, 1857. If, on the facts then existing, no relief can be had against Mary Ann Colby, then no relief can be had against her in this action by reason of any facts which have occurred subsequently.

These views make it necessary to reverse the order appealed from, and to vacate the order allowing the complaint to be amended.

In making this decision, we must not be understood as expressing the opinion that this action cannot be sustained on proof of the facts stated in the complaint.

If it can be, the matter of the supplemental complaint is wholly immaterial to the plaintiff's case, and is wholly irrelevant to the case made, and cannot in any manner affect his right to the relief sought, or the extent of the relief which it would be the duty of the Court to grant, on proof of the facts stated in the complaint.

So much of the order appealed from as allows a supplemental complaint to be filed must be reversed, and so much of it as vacated the order allowing the complaint to be amended, is affirmed.

Ordered accordingly.

HOFFMAN, J., dissented.

JOHN MOFFATT v. VAN DOREN et al.

1. In an action to recover possession of a pension certificate issued to the plaintiff, it is no defense, either legal or equitable, that the plaintiff left such certificate with the defendants as security for goods thereafter sold and delivered by them to him, relying on such security, and that there is a balance due to them for such goods.
2. Such facts do not create a lien in defendants' favor upon the certificate, nor constitute a right to any relief in this action.
3. Such facts, therefore, do not constitute a defense, or a counterclaim as defined by the Code.

(At Special Term, June 10, 1859, before BOSWORTH, Ch. J.)

THIS is a demurrer to the defendants' answer. The case made by the complaint is, that a pension certificate has been duly granted and issued to the plaintiff by the government of the United States, pursuant to the acts of Congress in that behalf; that it is in the possession of the defendants, who, on demand made, refused to deliver to the plaintiff, and the judgment is prayed that they deliver it to the plaintiff, and pay damages for its detention.

The answer states, as a defense, that the defendants sold and delivered goods to the plaintiff at his request, for which there was due, before this suit was commenced, a balance of $100.57; that such goods were sold and delivered on the security of such certificate, it being left with them by the plaintiff as such security, and it prays judgment against the plaintiff for such balance, and that they retain such certificate until the plaintiff pays the same, or the defendants have realized it from payments to be made upon said certificate.

W. H. Browne, for plaintiff.

N. P. Waring, for defendants.

BOSWORTH, Ch. J. The facts alleged in the answer constitute no defense to the plaintiff's action. Assuming all of them to be true, the plaintiff is entitled to the relief prayed for. The

alleged pledge of the pension certificate was wholly void by act of Congress, and gave the defendants no lien thereon. (*Payne* v. *Woodhull*, 6 Duer, 169.)

Do they constitute a counterclaim? The action is one for equitable relief, and is not one arising on contract. If the facts stated constitute a counterclaim, it must be for the reason that they make such a case as is defined by subdivision 1 of section 150 of the Code.

Do they constitute a cause of action arising out of the transaction "set forth in the complaint as the foundation of the plaintiff's claim?"

The whole transaction set forth in the complaint as the foundation of the plaintiff's claim, is, the grant to the plaintiff of the pension certificate, and the possession and wrongful detention of it by the defendants.

Proof of a grant of the certificate to the plaintiff, that it is in the possession of the defendants, and that, upon a demand made upon them to deliver it to the plaintiff, they refused to do so, not only entitles the plaintiff to recover, but makes a case which renders it impossible, in the nature of things, for the defendants to prove any facts which can operate as a bar to the action, or modify in any respect the plaintiff's right to the whole relief sought.

All this is set out in the complaint, except the particular facts constituting the alleged wrongful detention. The answer admits them all to be true, and then states the matters which (as the defendants aver) constitute the alleged wrongful detention. Those matters make a case of wrongful detention, and therefore, upon the complaint, answer and demurrer, the plaintiff is entitled to the whole of the precise relief prayed for; and there are no facts stated in the answer which can affect, in any manner, the nature or extent of the relief to which the plaintiff would be otherwise entitled.

In the *Xenia Branch Bank* v. *Lee*, (2 Bosw., 694, and 7 Abb. Pr. R., 372,) proof of the plaintiff's claim, as alleged in the complaint, would disprove the alleged counterclaim; and proof of the alleged counterclaim would disprove the plaintiff's alleged cause of action.

The transaction detailed in the complaint, put the paper title of the bills of exchange in question in the defendant.

The defendant's counterclaim (in that case) literally arose out of the transaction detailed in the complaint. In other words, he claimed title to the bills, and sought to charge the plaintiffs as indorsers of them, by reason of the several indorsements and transfers of the bills detailed in the complaint.

The allegation in the complaint, that the defendant took them with notice of the plaintiff's title, and of his own immediate indorser's breach of duty, and as collateral security for a precedent debt, the answer denied. But whether he thus took them, or took them in good faith, without the notice imputed, and for value, were the matters to be determined to ascertain what, in truth, was the precise transaction which the complaint assumed to detail with accuracy, as to its several particulars.

As they should be determined the one way or the other, the plaintiffs or the defendant would be entitled to recover, and the right of either to recover, as thus established, would rest upon the transaction which the complaint purported to describe, and which it professed to set forth, as the foundation of the plaintiff's claim.

In the present case, the only cause of action in favor of the defendants against the plaintiff, which can arise upon the facts stated in the answer, is for goods sold and delivered, and the utmost relief the defendants can have, is a judgment for the balance due to them. All the facts essential to the establishing of this cause of action are, the sale and delivery of goods by the defendants to the plaintiff, at his request, upon a credit which had expired before this suit was commenced, and that there was then a balance due therefor of $100.57, which still remains due and unpaid.

All else which the answer states, is irrelevant to this cause of action, because it in no way tends to prove it. This cause of action is not and cannot be affected by the consideration that the goods were sold on the security of this certificate, or by the consideration that the certificate was left as security after the goods had been sold and delivered, or that they had been sold and delivered without any security of any kind.

All the details stated in the answer, besides those mentioned as essential to all the cause of action the defendants have, are doubtless stated upon the theory, that all the facts alleged, (if admitted or proved to be true,) would entitle the defendants to

all the affirmative relief which their answer demands. But conceding that it is settled by *Payne* v. *Woodhull*, (*supra*,) that the most they are entitled to is a judgment *in personam*, for the balance due, then it must be admitted that the averments as to the agreement for pledging the certificate as security, and selling goods upon the security of it, are irrelevant, and in no sense form any part of the facts essential to or which constitute the defendant's cause of action.

They are not set forth in the complaint as any part of the transaction in which the plaintiff's claim is founded. No one of them need be proved to establish the plaintiff's case. Proving a part or all of them cannot add to or detract from the strength of the plaintiff's claim.

It is not true, therefore, that the only and whole cause of action which the allegations of the answer (if true) establish in favor of the defendants against the plaintiff, arises wholly or in part out of any transaction which is set forth in the complaint.

Nor is it true that proof of any one fact or incident which is necessary to establish it, need be given to prove the plaintiff's case.

All the claim and cause of action which the defendants have, is for goods sold and delivered on a credit which had expired before this suit was commenced.

The plaintiff's whole claim rests, and in the complaint is alleged to rest on the facts; that a pension certificate has been granted to him under an act of Congress, which is in the defendants' possession; and that they wrongfully detained it from the plaintiff.

I conclude, therefore, that the only cause of action which the answer describes, does not arise out of the transaction set forth in the complaint, as the foundation of the plaintiff's claim.

Nor is it a cause of action "connected with the subject of the action." The subject of the action is the pension certificate.

The defendants' cause of action is in no way connected with that. It is in no way dependent upon or affected by it; nor does it create any lien upon or right to it, or present any ground for relieving the defendants from any liability which the facts stated in the complaint, (if uncontradicted,) would impose upon them.

I do not think the Legislature intended or imagined that anything could be set up as a counterclaim under subdivision 1 of section 150, which, when established, would not, either at law or in equity, affect in any way the plaintiff's right to the whole relief which the facts stated in his complaint would entitle him to demand.

I think it was the object of that section to enable a party defendant to have all the causes of action in his favor against the plaintiff, growing out of a transaction set forth as the foundation of the plaintiff's claim determined, in one action, whether those claims on behalf of the defendant under the preëxisting system, were claims to equitable relief, or at law or in equity constituted a partial defense or total bar.

But if the cause of action on the part of the defendants, when established, could not affect the plaintiff's right to have a judgment, granting to him affirmatively all the relief to which, on proof of the facts stated in his complaint, he would be entitled, I do not think it was intended by that subdivision to allow such a claim to be set up as a counterclaim. (*Gleason* v. *Moen*, 2 Duer, 642, 643.)

But it is possible that human transactions may present a case in which a defendant may have a counterclaim, according to the definition of it given by subdivision 1 of section 150, and that such counterclaim, when established, will not, according to the present rules of law, or of equity jurisprudence, affect the affirmative relief to which the facts stated in a complaint, (if proved as set forth,) would entitle the plaintiff.

However that may be, I think the answer neither states a defense legal or equitable, nor sets up a cause of action in favor of the defendants against the plaintiff, arising "out of the transaction set forth in the complaint as the foundation of the plaintiff's claim," within the meaning of subdivision 1 of section 150 of the Code.

Judgment will, therefore, be entered in favor of the plaintiff against the defendants, upon the demurrer.

Ordered accordingly.

MARSH, Receiver, Plaintiff and Respondent, *v.* I. B. HUSSEY *et al.*, Appellants.

1. Where a receiver of the property of a judgment debtor has received notes made and indorsed by third persons as being the property of such debtor, and subsequently, as such receiver, brings a suit on such notes, and one of the defendants, who answers separately, obtains a verdict, such receiver is not personally liable to pay the costs of such defendant, unless the Court orders him to pay them for mismanagement or bad faith in such action.
2, Where such defendant issues an execution to collect the costs of the individual property of the receiver, when the Court has made no order directing him to pay them personally, it will be set aside as irregular.

(Before BOSWORTH, Ch. J., HOFFMAN, SLOSSON and MONCRIEF, J. J.)
Heard, June 11th; decided, June 25, 1859.

AN appeal by the plaintiff from an order denying a motion made by him to set aside an execution for irregularity.

William Marsh, the plaintiff, prior to commencing this action, was appointed by a Judge of this Court a receiver of the property and effects of one F. C. W. Wedekind. He was so appointed on proceedings supplementary to execution, in an action in which one Benjamin Marsh was plaintiff, and said Wedekind was defendant. Certain promissory notes made by "I. B. Hussey & Co.," alleged to consist of the defendants, "Isaac B. Hussey and David Clark, had," by indorsement of the payee thereof, come to the possession of Wedekind, and they were delivered by the latter to the plaintiff as such Receiver.

In April, 1856, the plaintiff, as such Receiver, sued Isaac B. Hussey and David Clark as the makers of said notes, and also made the first indorsers, parties defendants. The defendant, David Clark, separately answered the complaint, and at the trial obtained a verdict.

The moving affidavit states, *inter alia*, that the defendant Clark, "on the 30th of October, 1858, recovered a judgment against this deponent, as such Receiver as aforesaid, for $80, costs of said action," and on the 2d of November, 1858, without any order of the Court, issued an execution, directing the amount of the judgment to be collected from the individual property of the

plaintiff; that the plaintiff, as such Receiver, never had any property or effects, except the notes on which this suit is brought; that before said execution was issued, the defendants' attorneys demanded of him payment of the judgment, which he refused to pay, and stated, as the ground of such refusal, the facts above recited. BOSWORTH, Ch. J., before whom the motion to set the said execution aside was made, denied it, and assigned the following reasons, viz.:

"The plaintiff is not an 'executor,' 'administrator,' 'trustee of an express trust,' nor 'a person expressly authorized by the statute' to bring suits.

"He is not protected by section 317 of the Code from the consequences which section 305 visits upon a plaintiff who brings an action for the recovery of money, (§ 304, sub. 4,) and has a verdict pass against him.

"Before the Code, a Receiver, who sued at law without previous leave of the Court, paid costs as a matter of course. Sections 304 (sub. 4) and 305 leave him, in this respect, precisely as the preëxisting law did."

From the order denying that motion, the plaintiff appealed to the General Term.

A. K. Hadley, for the appellant,

Cited 3 Seld., 294; 2 id., 236; 5 id., 142, as holding that the plaintiff is a trustee of an express trust; and Laws of 1845, (pp. 90, 91, § 2,) in support of the proposition that he is "a person expressly authorized by statute" to bring an action.

To show that the execution was irregular, he cited the Code, § 317; 6 Hill, 386; 12 How. Pr. R., 301; id., 305; 9 id., 344; and 5 Duer, 648.

G. T. Jenks, for respondent.

BY THE COURT—BOSWORTH, Ch. J. The second section of chapter 112 of the Laws of 1845, (p. 91,) authorizes a Receiver to sue in his own name for any debt, claim or demand transferred to him, or to the possession or control of which he is entitled as such Receiver. The plaintiff being a Receiver, and being expressly authorized by statute to sue in his own name,

the notes in question, he is not personally liable to the defendants for their costs of the action, unless the Court directs the same to be paid by him personally, "for mismanagement or bad faith in such action." (Code, § 317.) The Court has not so ordered. The execution, therefore, was irregularly issued. The order appealed from must be reversed, and the execution be set aside.

Ordered accordingly.

JAMES STUART v. JOHN BINSSE, Executor, &c., of John La Farge, deceased.

1. Where a proposed case is served it is irregular for the adverse party to serve a case drawn by himself as a substitute, by way of amendment.
2. The settled practice requires that the lines of the proposed case be numbered, and that the amendments should be proposed in detail; that they be written on the proposed case, or on a separate paper, with a reference specifying the line and page of the original; and that before the case and amendments are submitted for settlement the place or passage where amendments are to be made or inserted be distinctly marked on the case submitted.
3. In addition to this, the rules of Court (Rules of 1858, No. 36) require that the party proposing a case or exceptions shall himself examine the amendments and mark upon each his assent or objection.
4. The same rules forbid the proposal to strike out large portions of the case in mass, by a single amendment.
5. If a proposed case should be so inaccurate as to render it practically impossible to correct it without striking out the whole or nearly all of it, a special application may be made for leave to serve a substitute, instead of making as many amendments as there are lines or sentences; but where counsel act in good faith this can very seldom, if ever, be necessary.

(At Special Term, July 21st, 1859; Before WOODRUFF, J.)

IN this action the defendant made a case upon which to move for a new trial. The plaintiff's counsel prepared an entire case and served it as a substitute, by way of amendment.

Thereupon the defendant moved to set aside the proposed amendment, and an affidavit was read on the motion stating that

the proposed case was very inaccurate, and that the substitute proposed more nearly corresponded with the proceedings on the trial.

John A. Bryan, for the defendant, in support of the motion.

Edward P. Cowles, for the plaintiff, in opposition thereto.

WOODRUFF, J. When the proposed review of the proceedings had upon a trial, requires that all or a large portion of the testimony be inserted in the case, and that testimony is voluminous, the labor of examining and settling it, when numerous amendments are proposed, is very great, and the Judge or referee is entitled to all the aid which counsel can give by arranging the papers so as easiest to present to his eye the precise difference between the parties.

To this end the settled practice requires that the lines of the case should be numbered, and that the amendments proposed should either be written on the case served or upon a separate paper, with a reference to the line and page of the original. (*Milward* v. *Hallett*, 1 Caines' R., 344.) And it is usual to require, when the amendments are on a separate paper, that before the case and amendments are submitted for settlement, each place or passage where amendments are proposed to be made or inserted shall be distinctly marked on the case submitted.

And in order, so far as possible, to abbreviate the labor of settlement, number 36 of the present Rules of Court requires that the party proposing a case or exceptions shall himself examine the amendments and mark upon each his assent or objection thereto.

These are rules of convenience, designed to facilitate the settlement of cases, and they must be observed. They are inconsistent with a proposal by the amending party to strike out the whole case and substitute another drawn by himself; and to permit this might lead to an abuse which would render the settlement of a case most tedious and embarrassing.

No doubt it would be a saving of time to the amending counsel if he might direct a scrivener to copy his own minutes of the trial, and by a single amendment propose to substitute it for the case served; and this would devolve upon the Judge or referee

the labor of comparison in detail, and often when in truth the particulars in which the difference is material are not numerous, and might easily be specified. Besides, if it be supposed, (as may often occur,) that the proposed case in many particulars best agrees with the Judge's minutes, and in many other particulars the proposed substitute is most accurate, the Judge, instead of briefly marking the amendments "allowed" or "disallowed," will be compelled to enter into prolix details in the act of settlement, specifying, (with as much labor, or perhaps even more, than if he were himself proposing amendments to the case,) the allowances or disallowances he makes. Indeed he would find it little less laborious to transcribe the whole case, conforming it to his minutes of the trial.

A practice so inconvenient could not be tolerated. It is the duty of the amending party to specify in detail each amendment which he deems material, and to do it so as to lessen, so far as possible, the labor of comparison and settlement.

It can hardly be supposed that, where counsel are acting in good faith, a case will ever be found so inaccurate, and a proposed substitute so accurate that a single allowance or disallowance would only be necessary. If such a case should be proposed, the Court might give leave to substitute a new case. No advantage in such an instance would accrue to either party, or to the Judge, by requiring each line or sentence to be separately amended, and as many amendments proposed as there are lines or sentences in the case. When such an instance occurs it may form an exception to the rule, to be made the subject of a special application for leave to propose a substitute; but to entitle the party to do this he must show that it is not possible to make all material changes without proposing amendments which will in substance amount to a new case, or which will render the comparison and settlement more prolix and tedious than to receive an entire substitute.

The proper meaning and purpose of the rule in like manner forbid the striking out of large portions of the testimony by a single amendment, and, if counsel act in good faith in preparing the case, that can rarely if ever be necessary.

In the present case, although the affidavit of the plaintiff's attorney states that the proposed case is very inaccurate, it is not

stated that there is any difficulty in specifying all the amendments of matters of substance in detail. Whole pages of the proposed substitute do not differ materially from the case as proposed. Indeed the language is to a large extent identical.

In conformity with what is unquestionably the general rule the proposed amendment (or substitute) must be set aside.

The plaintiff may serve amendments in detail within a reasonable time. The case is very voluminous, and if every alteration of language which the present substitute suggests should be made the subject of a specific amendment the amendments will be very numerous, but if the counsel look only to the substance of the testimony, and not to the mere form of words used, there will be no difficulty in so proposing amendments that the examination and settlement will not be burdensome.

As there is no reason to doubt that the amendment here was proposed in good faith, though not in conformity with the rule, I do not charge the plaintiff absolutely with the costs.

Amendment set aside, with leave to the plaintiff to propose amendments in proper detail within twenty days.

Costs of motion $10, to the defendant, to form part of his costs in the action, and abide the event of his recovery herein.

William Cousland and F. E. Bliss *v.* Dorrance Davis.

1. Where the owner of stock pledges it as collateral security for the payment of a usurious loan, he may, on a demand of the stock and a refusal to return it, recover its value in an action of trover.
2. He may maintain such action, notwithstanding the pledgee by the terms of the contract was authorized to hypothecate it, and had hypothecated it before such demand was made.
3. Where a defendant is ordered to be arrested and held to bail on an affidavit stating positively a cause of action which, *per se*, gives the right to such an order, the order will not be vacated as a matter of course, on affidavits which merely deny the existence of such cause of action.

(Special Term, October 28, 1859. Before Bosworth, Ch. J.)

The defendant moves to vacate an order made in this action October 11th, 1859, requiring him to be held to bail in the sum of $13,000.

The action is trover to recover the value of 260 shares of the stock hereinafter mentioned.

The plaintiffs, June 21st, 1859, gave to defendant their note at three months for $2,500, and on the 18th of July, 1859, their further note at three months for $4,000. They deposited with the defendant on giving the first note, and as security for its payment, 100 shares of "American Bank Note Company Stock," with authority to sell it without notice on failure to pay the note at maturity, "and with authority to use, transfer, or hypothecate the same at option, being required on payment or tender of the amount loaned and interest, to return an equal amount of said stock, and not the specific stock deposited."

The plaintiffs, on giving the second note, and as security for its payment deposited with the defendant other 160 shares of the same stock, on the like terms, and with like authority to defendant. The plaintiffs allege by affidavits that only $2,375 was loaned for the first note, and $3,800 for the second; that each loan was made on a usurious agreement; that the difference between the amount of the notes and moneys loaned was the usurious sum agreed upon; that a return of the stock had been demanded and its return refused; and that such stock was worth $13,000.

The defendant in his affidavit alleges that he advanced in cash $2,375 on the first note, and $3,800 on the second, and that $125 was included in the first note, and $200 in the second, "for and on account of services performed for plaintiffs by deponent some weeks previous to that time, and which plaintiffs then owed to deponent." He also alleges that he had hypothecated the stock, by virtue of the authority given to him in that behalf; that when the plaintiffs demanded the stock of him, the person to whom it was hypothecated was out of the city, and that he so informed them. The affidavits as to the value of the stock are conflicting, several stating it to be worth over $13,000.

Some other matters contained in the affidavits are stated in the opinion. The defendant moves to vacate the order of arrest, or if that motion should not be granted, to mitigate bail.

B. F. Dunning, for defendant.

Chapman & Hitchcock, for plaintiffs.

BOSWORTH, Ch. J. The defendant moves to vacate an order made the 11th October, 1859, requiring him to be held to bail in the sum of $13,000.

The action is brought to recover damages for the wrongful conversion by the defendant of 260 shares of the capital stock of the American Bank Note Company, and which are alleged to be worth $13,000, and to have then belonged to the plaintiffs.

The affidavits show that the defendant has hypothecated or sold 260 shares of such stock, which at the time were the property of the plaintiffs. If the defendant received these shares from the plaintiffs as security for a usurious loan, and if it was a part of the usurious agreement that these shares should be delivered as such security, and if they were delivered by the plaintiffs and received by the defendant, in pursuance of such an agreement, then the defendant's possession was wrongful from its commencement, and his disposition of the stock is tortious, and he is liable in this action. *Schrœppel* v. *Corning*, (5 Denio, 236; 2 Seld., 107,) are in point, and controlling authorities.

The usury as effectually vitiates that part of the agreement which authorized the defendant "to use, transfer, or hypothecate" the stock, as the part which pledged the stock.

Is a case of usury made out? The affidavit, on which the order was granted states facts with great precision and in detail, which, if true, establish usury. It is insisted that the defendant's affidavit contains an explicit denial of the allegations in that respect. The opposing affidavits, if true, show usury.

The cause of action is trover; whether such a cause of action exists, depends upon the truth of the allegations on the part of the plaintiffs as to usury. If the affidavits of the plaintiffs and of the defendant are in this regard in direct conflict, the order should not, for that reason, be discharged. (*Bedell* v. *Sturta*, 1 Bosw., 634.)

If the plaintiff succeeds in this action, his right to an execution against the body of the defendant is perfect and absolute. (Code, § 179, sub. 1, § 288.) The defendant's affidavit, at most, denies the existence of a cause of action. Under the former practice, where the plaintiff swore positively to a cause of action,

the defendant's affidavit, merely denying it, was disregarded, although he was, in the discretion of the Court, permitted to confess the cause of action and avoid it. (6 Wend., 524.)

I do not think a defendant is entitled to have an order of arrest, made in an action of trover, vacated merely because he denies the cause of action; its existence having been sworn to by the plaintiff with clearness and precision.

But on the papers before me, the defendant's allegation that $125 of one note, and $200 of the other, was for so much due him, for services, is denied; and what the services are, or when they were rendered, is not stated by the defendant, and it can hardly be said that the defendant's affidavit states facts, uncontroverted or entirely satisfactory in the relation he gives of them, to establish that the agreement was not usurious.

As to the amount of bail it is sufficient to say, that there is too much evidence that the stock is worth $13,000 to justify me in reducing it, on the ground that it is excessive or even unreasonable. The motion must be denied with $10 costs to the plaintiffs, to abide the event of this action.

From the order denying the motion, the defendant appealed to the General Term. The appeal was argued November 26th, 1859, at a General Term held before BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF and MONCRIEF, J. J., and the order was unanimously affirmed.

BURNETT *et al.* v. PHALON *et al.*

1. A new trial will not be granted on the ground of newly discovered evidence, where such evidence is merely cumulative.
2. Where the trial has been had before the Court without a Jury, and a motion is made for a new trial on the ground of newly discovered evidence alone, such motion will be decided, on the assumption that the Court found the facts correctly upon the evidence given, and that his conclusions of law upon the facts as found, are free from error.

(At Special Term, October 29, 1859. Before BOSWORTH, Ch. J.)

THE defendants move for a new trial, on the ground of newly discovered evidence. The action is brought by the plaintiffs to restrain the defendants from imitating their trade mark and selling a preparation of the defendants' manufacture under a label so closely imitating the alleged trade mark of the plaintiffs as to deceive dealers; and to recover damages for injuries to the plaintiffs, which they allege they have sustained by reason of such misconduct.

The action was tried before the Court without a Jury. The Court decided in favor of the plaintiffs, and ordered a reference to ascertain the amount of the plaintiffs' damages. Pending such reference, the defendants now move for a new trial, on the ground of newly discovered evidence, the nature of which is fully stated in the opinion of the Court.

BOSWORTH, Ch. J. This action was tried before a Justice of this Court without a Jury, who decided "that the word, noun, name, title or device, 'Cocoïnë,' is a spurious and unlawful imitation by the defendants of the word, name, title or device, 'Cocoaine,' the aforesaid trade mark of the plaintiffs," and adjudged that the defendants be perpetually enjoined from using either of those words.

The defendants move for a new trial on the ground of newly discovered evidence; that evidence consisting of the facts, that M. Weill & Co., from in 1846 into 1855, at Strasbourg, in Europe, manufactured toilet soaps from cocoanut oil, and used for that purpose about fifteen casks of cocoanut oil per month, and made and sold such soap in cakes of different sizes, having impressed upon each cake the words "Savon Cocoïnë," and that specimens of it were exhibited at the "Exposition Universalle" in Paris, in 1855, and that such soap had been extensively advertised, &c.

In disposing of this motion, I must assume that the Judge at Special Term found the facts correctly upon the evidence there given, and that his conclusions of law upon the facts he found are free from error.

His decision as to those matters must be deemed to be correct, for all the purposes of this action, except upon an appeal to the General Term, from the judgment, (to be entered on his decision.)

Disposing of this motion, on that assumption, it must be denied. It was proved on the trial that the word "Cocoïnë" was in a French Dictionary, and is an adjective. The newly discovered evidence merely proves that this adjective could be found on soap used in Europe as well as in the dictionary. If the fact that there was such a word in existence, and in a scientific work, in connection with the evidence given in relation to its adoption by Phalon & Son, and the form and style of the label on which they impressed it, will not justify them in using it as they did; the newly discovered evidence cannot affect the force of the evidence given on the trial to prove that "Cocoaine" is a new term, and was unknown to any one until after the plaintiffs had invented it. Such evidence is purely cumulative. If it be law, as was decided at the Special Term, this motion should be denied.

If the defendants are dissatisfied with the decision there made, either upon the law or the facts, their remedy is an appeal. On that appeal, an appeal from an order denying the present motion can also be heard, and thus the whole matter will be brought before the Court at General Term. The main question is undoubtedly one of interest and importance, and if the parties are so disposed, they can facilitate an appeal and avoid the delay of the reference ordered to ascertain the plaintiffs' damages.

Motion denied.

JOHN F. BUTTERWORTH, Receiver, *v.* JOHN W. WARTH.

1. Where, on a motion for a new trial, on the ground of newly discovered evidence, consisting of proof that the footings of the account contained in the book kept by the bank of which plaintiff is receiver, showing its daily cash balances, were erroneous; and which footings had been read to the jury as being accurate; a new trial will be granted where the judge is satisfied by the case, that if the book so read in evidence had contained accurate footings of said account, the verdict would have been for the defendant.

(At Special Term, October 29, 1859. Before BOSWORTH, Ch. J.)

THE defendant moves at Special Term on a case, and on affidavits of newly discovered evidence, for a new trial. The action

is brought by the plaintiff, as Receiver of the property and effects of the Island City Bank, against one H. Anton Miller, as the maker, and defendant Warth as the indorser of a note for $550, dated June 13, 1857, at three months, to recover the amount of such note and interest, which note the Bank owned when the plaintiff was appointed Receiver, (September 25, 1857,) and which was then past due.

The defense was, that on or about the 22d day of August, 1857, the defendant, Warth, left at the Island City Bank $300, to be deposited to his credit, which sum had not, in fact, been credited to him on its books, and he claimed that this sum and a balance (exclusive of this $300) of $275.54 standing on the books of the Bank to his credit, should be set off against the note, or enough to satisfy it. The defendant gave evidence tending to show, that at the time he left the $300 he was in a great hurry, and so stated, and put the money and his bank book on the counter of the Bank, in the presence of, and with the knowledge of an officer who was accustomed to receive money of customers and enter the deposits. There was some slight evidence favoring the hypothesis that the money and book were not seen by any officer of the Bank when they were so left, so that the money was exposed, and liable to be taken by any one who might have chanced to witness the transaction.

The Bank's book, showing its daily cash balances, and kept by the second Teller, to verify the accuracy of his account of daily transactions, was produced and read in evidence. As the entries in it, which were read to the jury as being accurate, were footed up, they showed a deficiency of twelve cents in the Bank's cash account on the day of the alleged deposit, and on the day next subsequent thereto, of $3.24. The affidavits of newly discovered evidence show, that on a correct addition of the items entering into that account, and which had been so footed up as to show the deficiency of twelve cents, there was an excess of cash on hand at the close of the day of the alleged deposit, of $749.88.

The defendant Warth also testified, that he had promised Miller to take up the note, and that he told the President of the Bank that he was to pay it, and had money enough in Bank to pay it, and the President said he would take care of it.

No objection was made against allowing the $275.54 to be credited upon the note, but the contest was, whether the $300 had been so deposited as to bind the Bank and entitle Warth to have enough of that sum applied to satisfy the note in full. The Jury found a verdict of $217.45 for the plaintiff. The cause was tried before BOSWORTH, Ch. J., in February, 1859.

Mr. Andrews, for defendant, Warth.

C. A. Peabody, for plaintiff.

BOSWORTH, Ch. J. I think the verdict is against evidence, if it be assumed that the evidence shows, that on the day on which, as the defendant testified, he left in the Island City Bank $300, to be deposited to his credit, the Bank's balance account for the day showed an excess in its favor of $749.88. The bookkeeper testified that the footings in the book of the Bank produced, showed a deficiency against the Bank, of twelve cents. That was true, and only true because the items were erroneously footed. He testified in good faith, and his statement of the result shown by the books, was taken as the truth of the matter.

My conclusion at the trial was, and now is, that if this book had not been produced and the testimony given in relation to the fact above stated, which was given, the verdict would have been in favor of the defendant.

I think a new trial should be granted on the terms of the defendant's paying the costs of the trial, and that the costs of the subsequent proceedings be costs in the cause, and abide the event. (*Kennedy* v. *The Harlem R. R. Co.*, 3 Duer, 659.)

Ordered accordingly.

STRAUS *v.* SCHWARZWAELDEN.

1. In an action against a defendant for criminal conversation with the plaintiff's wife, he may be held to bail on an affidavit which states a cause of action, and nothing more.
2. Such an action is one for "injury to person," within the meaning of those words as used in section 179 of the Code, subdivision 2.

(At Chambers, November, 1859. Before BOSWORTH, Ch. J.)

THE plaintiff, on affidavits showing that the defendant had been guilty of criminal conversation with the plaintiff's wife, moved *ex parte*, in an action brought to recover damages therefor, for an order to arrest and hold the defendant to bail. The Judge expressing some doubts, whether the defendant could be held to bail, under the Code, on an affidavit which stated merely a cause of action, and did not show that the defendant was not a resident of the State, or was about to remove therefrom, took the papers for consideration. The next morning he granted the order, assigning the following reasons:

BOSWORTH, Ch. J. If the question were *res nova*, whether a defendant, in an action of *crim. con.*, could be held to bail on an affidavit which established a cause of action and only that, and did not show that the defendant was a non-resident of the State, or was about to remove from it, I should hesitate about holding the wrong to be an injury to the person of the plaintiff (the husband) within the meaning of section 179 of the Code, subdivision 1.

It is an injury to the personal rights of the husband. But this section has been construed to embrace such a cause of action, under the description of an "injury to person." It was held that this language was used in its established legal signification; and that among injuries to person, are included the abduction or beating of a wife, or criminal conversation with her, for which trespass *vi et armis* would lie at common law at the suit of the husband. (4 How. Pr. R., 234; 3 Code R., 9; 3 Black. Com., 139, 140; 4 Cow. R., 412.)

An execution against the body would, according to the practice as established prior to the Code, issue as a matter of course

in such an action. If a construction so limited be given, that an order of arrest cannot be made on proof of a cause of action alone, it must follow that no *ca. sa.* can be issued on the judgment. It is difficult to believe that the Legislature, from any considerations of public policy, designed to abolish this remedy.

I am, therefore, inclined to think, that the construction given by Mr. Justice PARKER, and subsequently by Mr. Justice MASON, on consultation with his brethren, (3 Code R., 9,) is tenable. The order applied for is granted.

D. AND A. STURTEVANT, Plaintiffs and Appellants, *v.* BREWER & CALDWELL, Defendants.

1. In an action against the charterers of a vessel to recover the sum covenanted to be paid for a voyage from Galveston to New York, brought by an assignee of the charter party after the voyage has been performed, where it appears that the vessel, which by the charter party was to be kept by the owners staunch and tight, was, at the time the charter party was executed, at Galveston, in Texas, and S., S. & Co., of Galveston advanced $3,971.43 for port charges and putting the vessel in a condition to perform the voyage for which she was so chartered, (she being disabled and in distress, and the master having no moneys to repair her;) and where it also appears that S., S. & Co. have commenced an action in another court in this State, to establish a lien upon the freight moneys earned on said voyage to reimburse their said advances and obtained an injunction restraining the defendants from collecting any of such freight moneys, and have also obtained an order for the appointment of a receiver of such part of said freight moneys as the defendants have collected; the plaintiffs will be compelled to amend the summons and complaint so as to make said S., S. & Co., parties defendants, to the end that their claim to such freight moneys may be determined in this action, so as to conclude the present plaintiffs in respect thereto.
2. The liability of the defendants to the plaintiffs upon the charter party, depends upon the question whether S., S. & Co., have a right to all of said freight moneys; and that question, and to how much of said moneys S., S. & Co. are entitled, if not to all of them, should be determined by a single trial, so as to conclude all the parties thereby.

(Before BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF and MONCRIEF, J. J.)

Heard, November 26; decided, December 17, 1859.

JAMES L. FERRIS was, on the 10th of December, 1858, or claimed to be sole owner of the bark Convoy, and through his attorney, G. A. Ferris, entered into a charter party with the defendants, dated that day, chartering the vessel to them on her voyage from Galveston, Texas, to the port of New York. The owner was to keep the vessel tight and strong, in the usual language of such an instrument. The defendants were to provide and furnish for such vessel cargo sufficient for ballast, and were to pay for the charter or freight during the voyage $2,250 on the right delivery of the cargo at the port of New York.

The charterers were to have sufficient time to take in a full cargo at the port of Galveston, Texas, and dispatch in discharging at the port of New York.

Ferris assigned this charter party to the present plaintiffs, by assignment dated the 22d of June, 1859.

The bark was at the date of the charter party in the port of Galveston, where she was loaded with cotton, under the superintendence of Sorley, Smith & Co., her consignees. Bills of lading were signed by her master, to the order of the shippers, or consigning the cargo to various persons in New York. She arrived in New York about the 30th of March, 1859.

Sorley, Smith & Co., it is alleged, disbursed about the sum of $3,971.43 for the expenses and port charges of the vessel at Galveston. To cover this they drew a draft on the defendants, without authority, and the acceptance thereof was refused.

The defendants were proceeding to collect the freight when they were interfered with by the master, who received $600 of such freight, and gave notice to the consignees not to pay the freight to the defendants.

By instrument dated April 8, 1859, the master of the vessel assigned to Sorley, Smith & Co. all his interest in the freight money, and his lien thereon, for his advances and claims.

This action is brought on the charter party for the $2,250.

The homeward freight is stated to amount to $2,130. The defendants are said to have collected about $1,000.

Sorley, Smith & Co. have commenced an action in the Common Pleas claiming a lien on the homeward freight to reimburse them their advances, have obtained an injunction in said action restraining the defendants from collecting any of said freight moneys;

and also an order for the appointment of a receiver of the freight moneys collected by the defendants, which injunction and order are in full force. The owner of said vessel is insolvent.

On a motion made upon notice to the plaintiffs, and on the hearing of which Sorley, Smith & Co. appeared by counsel;

BOSWORTH, Ch. J., on the 26th of September, 1859, on affidavits establishing the facts above stated, made an order that the plaintiffs in this action, within ten days, amend their complaint and summons by making Sorley, Smith & Co. defendants, and inserting therein the proper allegations to show the claim made by the latter in their action against the present defendants; and staying all proceedings in this action until such amendments were made, and the amended summons and complaint were served on Sorley, Smith & Co., or their due appearance herein.

From this order the plaintiffs appealed to the General Term.

R. H. Shannon, for appellants.

Jeremiah Larocque, for respondents.

BY THE COURT—HOFFMAN, J. The claim of Sorley, Smith & Co. to a lien upon the freight, by force of their own advances, and under the assignment from the master, is apparently valid. In this country, the master has a lien on the freight and cargo for his necessary advances made and responsibilities incurred in a foreign port. (Flanders on Maritime Law, 180.) In *Sorley* v. *Brewer & Caldwell*, in the Common Pleas, the right is distinctly recognized by Mr. Justice HILTON, (18 How. Pr. R., 276;) and the lien upon the vessel in admiralty is sustained in Sorley, Smith & Co., by Justice BETTS, upon the facts of the case.

This lien, if it exists at all, will be paramount to the title of the charterers to the freight. Then the consequence will be, that the defendants have a valid, equitable defense to the action of the plaintiffs for payment of the hire of the ship. The fault or neglect of the ship owner, in not providing funds at Galveston, caused the existence of the lien, which deprives the defendants of the homeward freight. His act has defeated the consideration of the promise to pay the charter money. The equities, then, of the parties seem to be, that the plaintiffs must allow, as against the

demand on the charter party, the amount of freight which will be necessary to discharge Sorley, Smith & Company's lien. This the counsel appears to concede.

Thus we have the case of the liability of the defendants to the plaintiffs in this action dependent upon the question, to whom the home freight belongs. The act or neglect of the plaintiffs' assignor has vested third persons with an apparent right to it, which they are asserting. If the defendants pay the charter money, they may be also compelled to pay the freight they have received, or may be liable for.

The exposition of the 122d section of the Code appears to be, that other parties are to be brought in when it appears that their rights in the subject of the action must be settled before the rights of the parties to the suit can be determined. The court cannot definitely and correctly say what are the rights of the parties before it, in the subject matter of the suit, until the claims of others to it are determined. There are many cases in which a defendant may require other parties to be brought in, so that the judgment of the court in the action may protect him against the claims of such other parties. (*McMahon* v. *Allen*, 12 How., 39.)

The substantial point, and a main object of the action as now framed, is the determination of the right to the freight. The present seems to me to be a case in which the defendants have a right to the presence of Sorley, Smith & Co. for their protection. The act of the plaintiffs' assignor gave rise to the adverse claim.

The existence of the suit in the Common Pleas, in which, probably, every right can be properly settled, is not, in the present stage of that suit, an answer to the application to re-form and perfect the action here.

I do not examine whether this court can proceed by publication to bring in Sorley, Smith & Co., under the 135th section, subdivision 4, of the Code. As observed by the Judge below, they may, perhaps, be served here, or voluntarily appear. They did appear by counsel on the motion below.

One of the points made by the plaintiffs' counsel on the appeal is, that they admit that the defendants are entitled to set off the amount of freight which may be proved to have been earned by the Convoy on her home voyage against the sum claimed under the charter party.

But the counsel did not assent that such freight was the $2,130 as stated in the complaint of Sorley, Smith & Co. On the contrary, he was understood to say that it was only about $500. It is necessary to settle the amount to be deducted, as well as the right to a deduction.

The order must be affirmed, with costs.

Ordered accordingly.

AUGUSTUS MILES and another, Plaintiffs and Respondents, *v.* ALEXANDER CLARKE, Defendant and Appellant.

1. A practising attorney is disqualified to become special bail in a civil action.
2. If such bail be put in for the defendant, the plaintiff cannot treat it as a nullity: he must except to the bail, if he would insist upon the disqualification; and, on such exception, the bail will be rejected.
3. The Code, in prescribing the qualifications of bail, has merely declared the pre-existing practice by prescribing in terms the same requisites which were essential by long-established rules; and it has not removed the disabilities of attorneys and some other classes of persons to become special bail.

(Before BOSWORTH, Ch. J., WOODRUFF and MONCRIEF, J. J.)
Heard December 10; decided, December 17, 1859.

ON exception to the bail put in by the defendant on his arrest in this action, and on appearance to justify, it appeared that the bail was a practising attorney of this Court and of the other Courts of this State. On that ground, the bail was rejected. (See Case and Opinion, 2 Bosw., 709.) From the order disallowing such bail, the defendant appealed to the General Term.

David P. Hall and *Skeffington Sanxay*, for the defendant (appellant).

I. Attorneys were not disqualified to be bail by the common law. The practice of excluding attorneys is of recent date, and is founded entirely upon rules of the Court of King's Bench and

Common Pleas. (*George* v. *Barnsley*, 1 Chitty R., 8, n; *Laing* v. *Cundale*, 1 H. Bl., 76; *Boulogne* v. *Vautrin*, 2 Cowp., 828; 1 Tidd Pr. 230, 270; 1 Dunl. Pr., 170; Grah. Pr., 179, 180.)

In this State the Supreme Court adopted the rule of the King's Bench. (15 J. R., 535.)

II. When the statute has prescribed another practice, the rule of Court is abrogated. (*Barnett* v. *Pardow*, 10 Wend., 615; Grah. Pr., 953; *Walker* v. *Holmes*, 22 Wend., 614; 2 R. S., 597.)

III. This is a suit for relief. It is in the nature of a Chancery suit, and a solicitor might be a surety on an appeal bond. (*Richardson* v. *Richardson*, 5 Paige, 58.)

IV. The Code of Procedure has abrogated all rules and practice except that which itself prescribes. If the bail offered be householders or freeholders, and worth the amount specified in the order of arrest, this Court has not the power to exclude them because they are attorneys. (§§ 194, 469.)

V. The Court below erred in holding that the Code had not substituted a new rule. (*Stewart* v. *Howard*, 15 Barb., 26.) It is error to suppose that the *Code* was merely declaratory of the affirmative qualifications of bail, and that attorneys were disqualified by the common law.

The practice is not "nearly three hundred years old," as the Justice in his opinion states, but is founded in a rule adopted by the King's Bench (12 Geo. II), about one hundred years ago.

Geo. W. Parsons, for the plaintiffs (respondents).

I. The Code has not altered the rule by which attorneys are disqualified to become bail.

1. The provisions of the Code are similar to those of the Revised Statutes. (§ 11, title 1, ch. 6, part 3.)

2. If it is absolutely true that all persons possessing the qualifications named in the Code (§ 194) are sufficient bail, then minors and married women may become bail.

II. There is no hardship in excluding such bail.

III. The opinion of the Justice at Special Term correctly states the history of the rule and the operation of the Code. (See authorities there cited, 2 Bosw., 709.)

By the Court—Woodruff, J. We are of opinion that the order appealed from should be affirmed, upon the grounds stated as reasons for the decision given by the Justice by whom the order was made. (2 Bosw., 709.)

We, therefore, think it unnecessary to enter into an extended discussion of the point decided.

It will be sufficient to notice some of the cases which were urged on our attention on the argument of the appeal.

Neither is it important to inquire into the antiquity of the rule which prohibited attorneys from becoming bail; but so early as in Michaelmas term, 1654, it was ordered in the Court of King's Bench, in England, that no attorney be bail in that Court, and a similar rule is found among the rules of the Common Pleas of the same term. (*Hawkins* v. *Magnall*, Doug., 466, and notes.) What was then declared by the rules of Court, has continued to be the practice of the courts in England to the present time. Whether this practice be described as "nearly three hundred years old," or as over two hundred years old, can hardly be worthy the importance given to that inquiry on the argument; nor is there anything in the books to indicate decisively whether the practice then had its origin, or was at that time reënacted in the body of rules then promulgated. Its being found in the rules of that term is not conclusive on that point; for it appears by the report of *Laing* v. *Cundale*, and the note thereto, (1 H. Bl., 76,) and by *Bolland* v. *Pritchard*, (2 Wm. Bl., 799,) that in 1733, (6 Geo., 2,) the rule was again promulgated in the Common Pleas, and by *Boulogne* v. *Vautrin*, (Cowp., 828,) that in 1741 (14 Geo., 2,) the same rule was again promulgated in the Court of King's Bench. (See Tidd's Pr., title "Special Bail;" *George* v. *Barnsley*, 1 Chitty's R., 8; 1 Taunt. R., 164, 165.)

It is not denied that the same rule of practice was declared in this State in *Coster* v. *Watson*. (15 J. R., 535.) The language imputed to the Court in the report of that case, referring to the rule prevailing in the Courts of King's Bench and Common Pleas, in England, approving of the rule, and adding, "we therefore adopt it," is supposed to indicate that the rule had not before existed in this State; but the Court, in *Satterlee* v. *Satterlee*, (8 J. R., 327,) in reference to another point of practice, state that the practice of the Court of King's Bench in England, is the practice

of the Supreme Court in those cases in which a different practice has not been established. Not only so, in *Coster* v. *Watson*, if such was not already the binding practice in this State, the bail put in was regular, and no attachment against the Sheriff could have issued for want of compliance with a rule to bring in the body for want of bail; and yet the motion for an attachment was granted. The Court would not adopt a new rule and at the same time regard a previous proceeding as irregular because it did not conform to it. The Court must be deemed to have recognized the existence of the rule, approved of it and declared its binding force, and not to have then announced it as a future guide. Nor was it then promulgated as a rule of Court; it was decided to be the rule of practice, and the case itself is a decision and not an enactment. So the subject was treated in *Bailey* v. *Warden*, (20 J. R., 129,) where the decision reported is, "We have decided that an attorney is not good bail if excepted to, and for the same reason we think a Sheriff ought not to become bail; and such is the rule of the English Courts." The Court, therefore, granted a motion to set aside a justification.

Although some cases are referred to in this State which are supposed to show that under our present statutes the objection cannot now be urged, it is pertinent to observe that no case can be found in which it is held that an attorney, if excepted to, will be held sufficient as special bail. The Revised Statutes contain no enactment inconsistent with the previous practice. Unless, therefore, the Code of Procedure (first enacted in 1848) contains in its declaration of the qualifications of bail language which should be held to abrogate the rule, it is still in force, for by the 469th section of the Code, it is only the rules and practice of the Courts which are inconsistent with the Code which are abrogated.

The Code in prescribing the qualifications of bail have simply set down in terms what were already, by long practice and constant decision of the Courts, the requisites to constitute good bail. On this subject the Code simply embodied in the form of enactment what was already long settled. The provisions form part of a system, collected, digested, and in very many particulars largely altered and improved, but in this left unaltered. In our judgment there is no warrant for saying that the Legislature intended to change the qualifications, or affect the competency

of bail in any particular. He must still be competent to enter into a valid binding contract of this description, and be amenable to the ordinary process of our courts of justice; this we think is not doubted.

It is insisted, however, that, inasmuch as the former settled practice has been embodied in the Code in the form of statutory enactment, the courts have now no power to recognize as exceptions those cases which were, by that practice, clear exceptions.

We have no hesitation in saying that the qualifications prescribed in the Code are to be understood as they were before the statute was enacted, viz., persons otherwise competent shall be received as bail if they reside in the State, are housekeepers or freeholders, and are worth the requisite amount. In this there is no inconsistency with the provisions referred to.

Before considering the cases in this State which are supposed to sustain the defendant's claim herein, it is proper to observe that because, under the settled practice already stated, attorneys are not sufficient bail, it does not follow that, therefore, when they are put in the bail piece as bail, the putting in of such bail can be treated as a nullity. If excepted to they would be rejected, but if not, then for many purposes they would be regarded as bail to the action. And this consideration will, we think, serve to show what is to be deemed the true force and meaning of whatever in those cases is supposed to be inconsistent with the views we entertain.

Thus in *Thomson* v. *Roubell*, (cited in note to Doug. R., 466,) an attorney became bail, the plaintiff did not except, but treated it as a nullity. The Court held that the bail piece was not void, and that the plaintiff by not objecting had accepted his security. So in *Bell* v. *Gale*, (1 Taunt., 161,) and *Rex* v. *The Sheriff of Surrey*, (2 East., 181,) in which last case the Court say, "it is too well settled to admit of dispute, the plaintiff must except to the bail and cannot consider it as a nullity."

The first case urged upon our attention is *Barnett* v. *Pardow*. (10 Wend., 615.) In that case no question arose whether an attorney could become bail or not. The only point in discussion was whether bail in error could justify *ex parte*, without notice to the defendant in error. It does not appear that the bail in error was an attorney or other officer of the court. The decision

was, that inasmuch as the Revised Statutes had provided that the sureties should, if excepted to, justify within ten days, by an affidavit in a prescribed form, and a copy of the affidavit should, before the expiration of the ten days be served on the defendant in error, (2 R. S., 597, § 35,) it was sufficient if there was a compliance with the statute.

In the previous statute (1 R. L., 143, ch. 25, § 2,) which was in substance a transcript of the provisions of the English statute of 3 James I, chapter 8, as modified by 13th Charles II, statute 2, chapter 2, section 9, the sureties were to be approved by the court in which the judgment was given, and the practice was for the sureties, if excepted to, to justify on notice. (4 Burr, 2501; 1 Wils., 213; 8 Durnf. & East., 639.) In *Moody* v. *Baker*, (5 Cow., 414,) the Supreme Court state the practice to be substantially as in case of bail to the action.

All the Court decided in *Barnett* v. *Pardow*, is that the Revised Statutes have prescribed a new form or mode of justification, viz., by affidavit and service of a copy, and therefore such justification may be *ex parte* without notice, since this is a compliance with the statute and no benefit could result from the attendance of the defendant in error at the time and place of justification. Whether an attorney was, under the Revised Statutes, competent to become bail in error, was not a question in any manner before the Court, and not a word is contained in the report of the case on the subject. Doubtless he was incompetent under the English practice within the rules of 6th and 14th Geo. II, since their phraseology would include bail in error. (See 2 R. S., 598, § 35; Laws of 1844, p. 466, ch. 312; Laws of 1845, ch. 10.)

The next case cited is *Walker* v. *Holmes*, (22 Wend., 614,) in which it is held that an attorney may become surety for the payment of costs by a non-resident plaintiff; the Court, as in the last case saying that the plaintiff had complied with the statute which regulated that subject. (2 R. S., 620, tit. 2.) Before the statute as well as under the statute the attorney was liable for costs to the extent of $100. (Rules of Jan'y, 1799.)

So that it was no change of the rule on that subject to hold that an attorney could become voluntarily and expressly bound for the costs; he never was disqualified. (Gr. Pr., 52 and 508, and cases in this State and England cited; 2 Cow., 460; 6 Wend.,

660; 10 id., 621; 4 J. R., 484; 20 id., 475; 13 id., 125; 1 Hopk. Ch. R., 117; Ch. Rules of 1806; 1 John. Ch. R., 202.)

The remaining case cited is *Studwell* v. *Palmer*, (5 Paige, 57,) in which the point decided was that on a motion to dismiss an appeal it was not a sufficient ground, that one of the sureties in the appeal bond was a solicitor.

It has already been shown that in the common law courts such bail was not a nullity, and it had been previously decided that this was not a ground for quashing a writ of error, although it would have been a good exception. (*Scott* v. *Craig*, 1 Wend., 35.) The case in Paige, therefore, does not conflict with what has already been said. Besides the Chancellor says, neither the statute regulating appeals nor the rules of the Court of Chancery contain any prohibition against a solicitor becoming a surety in an appeal bond. If so, he was doubtless competent. This proposition has no application to special bail in this Court, in respect to whom, long settled practice had declared attorneys to be incompetent. And we are not aware of anything in the Code which makes the practice of the late Court of Chancery on appeals to that Court apply to bail to the action in this Court.

These considerations seem to us to dispose of the cases cited, and it only remains for us to say that, we concur in the reasons assigned at Special Term for holding an attorney incompetent to become special bail, against the objection and exception of the plaintiff.

The order appealed from should be affirmed, with $10 costs.

Ordered accordingly.

Thomas H. Bate *v.* Lewis S. Fellowes *et al.*

1. Prior to the enactment of the Code of Procedure, if a plea *puis darrein continuance* was offered in due season and was not palpably insufficient or pleaded for delay, it was a matter, of course, to permit it to be filed. Although the plea was in form by leave of Court, it was so in such case in form only. But such plea, if it set up new matter of defense not going merely to the plaintiff's remedy, waived the former plea.

2. Under like circumstances, leave should be given to file a supplemental answer which, under the Code, is a substitute for a plea *puis darrien continuance*, and no larger discretion was designed to be given to the Court on that subject by the Code (§ 177) than was previously exercised in respect to such a plea.
3. Although the putting in of a supplemental answer does not, under the Code, necessarily waive the former answer, yet, where the matter sought to be introduced thereby would, before the Code, have required a plea *puis*, which would have waived such former answer, the Court may, where the new defense is of doubtful sufficiency and of doubtful equity, require the defendant to waive his former answer, and rest solely on such new matter, as a condition of granting leave to file such supplemental answer.
4. Whether a judgment of nonsuit in a proceeding by way of intervention to claim goods which are attached by the defendant as the property of a third person is, by the laws of Louisiana, a bar to an action by the intervenor for damages for taking the goods, is a question of fact to be proved, and the Court will not, on an application for leave to put in a supplemental answer to set up such a judgment rendered after the former answer, undertake to determine that question upon conflicting affidavits.

(At Special Term, December 31st, 1859. Before WOODRUFF, J.)

MOTION by the defendants for leave to file a supplemental answer. The facts sufficiently appear in the opinion of the Court.

Barzillai Slosson, for the defendants, in support of the motion.

David Dudley Field, for the plaintiff, opposed.

WOODRUFF, J. The defendants move for leave to file a supplemental answer herein, setting up in bar of the plaintiff's action a judgment rendered in one of the courts of the State of Louisiana, and alleged to be, by the laws of that State, conclusive against the plaintiff. It appears by the papers submitted, that this is an action brought by the plaintiff to recover the value of certain goods taken by the defendants on an attachment issued in New Orleans against a third person in the possession of the goods. That the plaintiff claims that the goods were his property and not the property of the defendant in the attachment.

By a proceeding authorized by the laws of Louisiana, the present plaintiff, in that State, after the seizure, interposed a claim to the goods attached, asserting title thereto. His claim, as intervenor, was put in issue and brought to trial, together with the principal suit in which the attachment was issued; but the

plaintiff, so intervening, offered no proof of title and submitted to a nonsuit, and judgment of nonsuit was accordingly entered against him.

This judgment was entered since the answer of the defendants in this action was put in.

If the judgment of nonsuit so entered in the Louisiana Court is conclusive, by the laws of Louisiana, against the plaintiff, (the intervenor there,) then it is obvious that had it been rendered before the answer in this action was put in, and had it been set up by the defendants in their answer, it would have been conclusive in the defendants' favor, since we should be bound to give to that judgment the same force and effect which it would have if that action were prosecuted in Louisiana for the taking of the same goods.

But it is entirely certain that a judgment of nonsuit in our own courts does not, by the laws of this State, prevent another action founded upon the same claim which the party had set up in the action wherein the nonsuit was ordered.

It is further entirely certain that the merits of the controversy between these parties have not in fact been tried. Whether the plaintiff was or was not the owner of the goods taken under the defendants' attachment, has not been ascertained or settled upon any proofs taken and submitted to the Louisiana Court.

The most that has been done is this: The plaintiff set up his claim of title, and had an opportunity to establish it by proof, but chose to retire from the contest, offer no evidence, and submit to be nonsuited.

The objection to the present motion rests mainly on two grounds alleged by the plaintiff in resistance of the motion: First, that a judgment of nonsuit is not, by the laws of Louisiana, a bar to another independent action for the same goods, and therefore, (such a judgment not being a bar by our laws,) to grant the motion would be to permit the defendants to embarrass the litigation by setting up an insufficient defense, and at the same time subject the plaintiff to great expense and delay in procuring testimony to show what the law of Louisiana is on the subject. And second, if it be possible that, by the laws of Louisiana, a judgment of nonsuit entered upon such an intervention as appears by the record of the proceedings there, is by their

laws a bar to another action, the law is harsh and inequitable, and operates to deprive a party of his property by a merely technical rule, when the merits of his claim have never been investigated.

As to the first objection, the affidavits submitted are contradictory, and it is not clearly shown that, by the laws of Louisiana, their judgment does not bar a new suit, and yet I shall deem it very extraordinary if so marked an exception to the rules which apply to that subject, wherever the common law prevails, be found to exist by the laws governing the conduct of judicial proceedings in that State. Especially, since I think it quite clear that in general a judgment of nonsuit in one action is no bar to another suit for the same cause, by the express provisions of their Code. Nor can I perceive any reason why a nonsuit, ordered upon such an intervention as was had under the proceedings on attachment against the third person, should conclude the plaintiff any more than a like judgment in an action for the taking of the goods would have done.

But I do not deem it proper to try this question upon affidavits. Whether the nonsuit is or is not a legal defense, is not a mere question of law which I can judicially declare. It must depend on proof of the foreign law, and may, under proper instructions, be a question for a jury. I must, therefore, decline deciding this motion on an assumption that the defense sought to be interposed will be insufficient. As to the other objection, viz.: that if the defense be strictly legal it is not equitable, and therefore, since the defendants cannot interpose it without the express leave of the Court, that leave should be withheld, two observations are pertinent.

Although it is true that a judgment of nonsuit does not necessarily determine the rights of the parties, and in this case no actual investigation of those rights has ever been had, yet, if the plaintiff has once set up his title in a court of justice, and had full opportunity to establish his rights, (if they exist,) and has put the defendants to the labor and expense of preparation to show that the plaintiff has no such rights or title, and they had procured and had ready the evidence in Court for that purpose, it is not clearly and inevitably unjust to deny to the plaintiff the privilege of withdrawing and afterwards vexing the

defendants by a new suit for the same cause of action. And if by the laws of Louisiana, the failure of the plaintiff to offer any proof of his claim, and the judgment for the defendants thereupon will conclude him, I cannot say that it is palpably unjust and inequitable to permit the defendants to avail themselves of that protection.

Again, prior to the enactment of our Code of Procedure, the defendants would have been entitled, as of course, to interpose this defense by plea *puis darrein continuance.* Although the plea was in form by leave of Court, yet it was so in form only. By long settled practice, if the plea was duly verified, was offered in due season, and was not palpably insufficient or pleaded for delay, it was received of course. I cannot think that, in respect to matters which might before have been properly set up by plea *puis darrein continuance*, and which are offered in proper season, the Code was designed to alter the rule so as to leave the reception of the plea open to a larger discretion than the Courts previously exercised on the same subject. When such a plea would, on motion, have been ordered off the files, on the ground of fraud or gross injustice, the Court may now refuse to receive it as a supplemental answer; but under the circumstances of this case, I have no doubt the plea now proposed would have been received.

But it was well settled that, where a plea *puis darrein continuance* set up new matter in defense of the action, and not going to the plaintiff's remedy merely, it waived the former plea.

The manner in which provision is now made for filing supplemental answers, has made it doubtful, at least, whether such answers are not in all cases (unless the Court otherwise orders) to be deemed an addition to, and not substitutes for, the previous answers. But I have no doubt of the power of the Court to impose it as a condition that the defendants shall, if they interpose this new defense, submit to the same consequences which would have followed a plea of the same matter, *puis darrein continuance*, before the Code.

And this is a case in which it is peculiarly proper to impose such terms. If the defendants be permitted to avail themselves of what was matter of right under our former system, they may properly be required to submit to the same consequence which

would have followed under that system if they exercised the right.

Notwithstanding what has been above suggested, I deem the defense one of such doubtful equity, and also of such doubtful sufficiency, that it is proper to require the defendants, if they insist upon it as a defense, to rest upon that defense alone, and take the hazard of sustaining it. The motion is, therefore, granted, with $10 costs of motion to either party to abide the event of the suit, on condition that the defendants waive their previous defense.

McCreery *et al.* *v.* Willett, Sheriff.

1. In an action under the Code, brought against a Sheriff for the escape from his custody of a debtor imprisoned on a *ca. sa.*, the sheriff is liable for the amount of such judgment.
2. It is not a defense, either total or partial, that the debtor at the time of such escape was insolvent.
3. The Code, by abolishing all the forms of pleading theretofore existing; has not affected the measure of a Sheriff's liability, for the escape from his custody of a debtor imprisoned on execution against his body, as declared by 2 Revised Statutes. (437, § 66. [Sec. 63.])
4. A complaint which states facts establishing the Sheriff's liability for such an escape, and concludes by averring that the Sheriff thereby became indebted to the plaintiff in the amount of the judgment on which the execution issued, and that the action is brought to recover that sum, and prays judgment for that sum, indicates clearly that the action is brought under 2 Revised Statutes, (437, § 66, [63,]) to recover the sum authorized by that section.

(At Special Term, January, 1860. Before Bosworth, Ch. J.)

This is a demurrer by the plaintiffs to a part of defendant's answer, which is pleaded as a separate defense. The facts appear fully, in the following opinion.

A. Matthews, for plaintiffs.

A. J. Vanderpoel, for defendant.

BOSWORTH, Ch. J. The complaint states the recovery of a judgment by the plaintiffs against one Gottschalk Brown, and facts showing a right to an execution thereon against the body of Brown, the issuing of such an execution to the defendant, as Sheriff of the county of New York, the arrest by him of Brown on such execution, and an escape of Brown from the custody of the defendant after such arrest was made.

The defendant pleads as a separate defense, the insolvency of Brown in mitigation of damages. To this part of the answer the plaintiffs demur, on the ground that it does not state facts constituting a defense, either total or partial.

The point of the defendant's argument is, that as the Code has abolished all the forms of action existing at the time it took effect; that it has abolished the action of *debt* given by 2 Revised Statutes, (437, § 63,) and compelled the plaintiffs to resort to an action on the case, and therefore has restricted their right to recover, to the damages actually suffered; and that in an action on the case, it was always competent for the Sheriff to prove the insolvency of the debtor who had so escaped.

This Court, in *Renick* v. *Orser*, (4 Bosw., 384,) held that section 140 of the Code, by abolishing "all the forms of pleading" theretofore existing, had not affected the measure of a Sheriff's liability, for the escape of a person committed on a *ca. sa.*, as declared by 2 Revised Statutes. (437, § 66. [Sec. 63.])

I see nothing in the system of practice established by the Code, or in the provisions of the Code, favoring the idea that it was designed to modify or abrogate *rights* as established by preëxisting law. The design was to simplify the forms of procedure, and that only, when not otherwise declared by the Code itself.

Section 468 [388] of the Code declares "that all rights of action given or secured by existing laws, may be prosecuted in the manner prescribed by this act." Section 471 [390] declares that the second part of the Code shall not affect "any existing statutory provisions relating to actions, not inconsistent with this act, and in substance applicable to the actions hereby provided."

Section 291 [246] declares that "the existing provisions of law, not in conflict with this chapter, (ch. 1, of title IX.,) relating to executions and their incidents, * * the powers and rights of officers, their duties thereon, and the proceedings to

enforce those duties, and the liabilities of their sureties, shall apply to the executions prescribed by this chapter."

The complaint alleges the recovery of a judgment against Brown for $4,876.09, and after stating facts showing the Sheriff's liability for the escape of Brown, proceeds thus: "Wherefore the plaintiffs aver that said defendant, as such Sheriff, became indebted to the said plaintiffs in the said sum of $4,876.09, for the recovery of which this action is brought," and demands judgment for that sum.

This is a clear indication that the plaintiffs sue under 2 Revised Statutes, (437, § 66, [63,]) to recover the precise sum which that section declares a plaintiff (in such a case as it describes) is entitled to recover as a matter of course and of right.

In *Hutchinson* v. *Brand*, (5 Seld., 208, 210, 211,) the Court said: "The permitting of the defendant to go at large after his arrest upon the process, and before his actual commitment within the four walls of the prison, was an escape, entitling the plaintiff to recover his whole debt against the Sheriff. (2 R. S., 437, § 63; 8 Wend., 545.)"

While it does not appear that the question of the debtor's insolvency was attempted to be proved in that case, as a ground for mitigating damages, it is nevertheless quite evident, from the language of the Court, that it did not imagine that the new system of pleadings affected the measure of the Sheriff's liability, for the escape from his custody of a debtor arrested on a *ca. sa.*

Renick v. *Orser*, (*supra*,) requires me to sustain the demurrer, and I think the views above suggested furnish some additional reasons supporting the decision made in that case.

Judgment is ordered in favor of the plaintiffs on their demurrer.

KEDENBURGH *et al.* v. MORGAN.

IT was decided in this case, that in an action on contract for the recovery of money, no execution can be issued on the judgment, against the body of the defendant, unless prior to judgment an order was made to arrest and hold him to bail.

Heard at Chambers, before MONCRIEF, J.

Heard in General Term, before BOSWORTH, Ch. J., and WOODRUFF, PIERREPONT and MONCRIEF, J. J., December 31, 1859; decided, January 14, 1860.

See the points decided, in the index to this volume, under the title, "Practice—Arrest."

And see the motion and appeal reported at length, with the opinion of the Court at General Term, in 18 How. Pr. R., 469.

THE BANK OF TORONTO v. WILLIAM B. HUNTER.

1. Although at law, one who accepts a bill for the accommodation of the drawer, is regarded in favor of a *bona fide* holder as the principal debtor, yet as between such acceptor and the drawer, the former stands in the relation of surety, and in equity he is entitled, on payment of the bill, to be subrogated to the position of such holder of the bill, in respect to any securities of the drawer held by such holder to secure the payment thereof.
2. Hence, in an action against the accommodation acceptor by a non-resident holder of the bill, the drawers having become insolvent, the defendant may, under the Code, (which authorizes the Court to give equitable as well as legal relief in the same action,) put in an answer in the nature of a cross bill in equity, demanding such subrogation upon payment of the amount due to the plaintiffs.

(At Special Term, January 14th, 1860. Before WOODRUFF, J.)

DEMURRER to the defendant's answer. The plaintiff is a foreign corporation, doing business in Toronto, Canada. The action is brought against the defendant, as acceptor of a bill of exchange. The answer avers that the bill was accepted solely for the accommodation of a firm of Tisdale & Co., the drawers thereof, without any consideration, and this was known to the plaintiffs when they took the bill. That securities belonging to the drawers were lodged by the latter with the plaintiffs to secure the payment of the bill; that such securities are sufficient to provide for the payment of the bill, that the drawers of the bill are insolvent; that the defendant has offered, and he in the answer offers to pay to the plaintiffs the amount of the bill on a transfer to him of such securities; and the defendant prays, that on payment of the amount due to the plaintiffs, a transfer of such securities be made for his indemnity, by way of subrogation to the rights of the plaintiffs in respect thereto.

Hinsdale, Swan and Sands, for the plaintiffs,

In support of the demurrer, cite *Fentum* v. *Pocock*, (5 Taunt., 192,) *Murray* v. *Judah*, (6 Cow., 484,) *Grant* v. *Ellicott*. (7 Wend., 227.)

I. The acceptor is to be treated as principal, and not as surety.

II. The defendant should, before suit brought, have made an unconditional tender of the amount due, and filed an original bill after such tender. (*Hayes* v. *Ward*, 4 Johns. C. R., 123.)

III. The right of subrogation depends upon various conditions, and cannot be examined in this suit.

Wm. H. Leonard, for the defendant.

I. In equity, the defendant was surety merely, and the plaintiffs knew it.

II. The right of the defendant to subrogation is, in equity, clear, and the plaintiffs cannot divert the securities even with the consent of the drawers, so as to deprive defendant of indemnity.

III. No actual tender before suit brought was necessary. (*Cherry* v. *Monro*, 2 Barb. C. R., 618.)

WOODRUFF, J. Although at law the defendant is to be regarded as the principal debtor, as between him and the plaintiffs,

yet as between himself and Tisdale & Co., the drawers of the bills, he stands in the relation of surety for such drawers, and in respect of any securities belonging to the drawers held by the plaintiffs to secure the payment of the bills, his equity is the same as it would be if his suretyship appeared on the face of the bills.

If, in ignorance that the defendant was a mere accommodation acceptor, the plaintiffs have given any further credit to Tisdale & Co. in reliance on those securities, which should defeat the defendant's *prima facie* equitable right of subrogation, it will be for the plaintiffs to set it up for that purpose; but, taking the facts as they are stated in the answer, to be true, I think the defendant's right of subrogation to be clear. And as the principal debtors are insolvent, and the plaintiffs are a foreign corporation coming into our jurisdiction for the purpose of collecting the debt, and whom, if the defendant first pays the bills he cannot reach by any process of our Courts, he would in respect of his right of subrogation be remediless, if he might not, by his answer, in the nature of a cross bill in equity, assert and maintain his claim to affirmative relief, under sections 150 and 274 of the Code.

There is no well founded objection to the determination of all the rights of the parties, legal and equitable, in relation to the same subject matter in one suit, and as the right claimed by the defendant to be subrogated to the position of the plaintiffs upon payment of the debt for which, in equity, he is surety only, is, I think, clear, the demurrer of the plaintiffs to his answer must be overruled, with costs; but with leave to the plaintiffs to withdraw the demurrer and reply, if so advised upon payment of the costs of the demurrer and proceedings thereon. (*Curtis* v. *Tyler et al.*, 9 Paige, 432; *Wilkes* v. *Harper*, 2 Barb. C. R., 338; *Mathews* v. *Aikin*, 1 Comst., 595; *Pitts* v. *Congdon*, 2 id., 354; *Eddy* v. *Traver*, 6 Paige, 521; *Cherry* v. *Monro*, 2 Barb. C. R., 618.)

Ordered accordingly.

CHARLES FRENCH *v.* JAMES C. WILLET, Sheriff, &c.

1. In an action against a Sheriff for not delivering to his successor in office a prisoner taken by him and committed to jail on an execution against the body, averred to have been duly issued upon a judgment in an action brought to recover a debt which was fraudulently contracted, it is not essential that the complaint should also state that an order for the arrest of the defendant was obtained.
2. Where an execution is regular on its face and there is no defect of jurisdiction, neither irregularity nor error in issuing the execution will justify the Sheriff in refusing or neglecting to execute it.
3. Otherwise if the execution be void.
4. A complaint, which, after stating the due commitment of the prisoner by the defendant as Sheriff to the county jail, then proceeds to state the expiration of the term of the defendant's office, the election of a new Sheriff, the due qualification of the latter and the service upon the defendant of the certificate of the County Clerk that such new Sheriff had qualified and given the security required by law, (2 R. S., 438,) and avers that the defendant did not, within ten days after such service, deliver to the said new Sheriff the prisoner, then in the defendant's custody on the said execution and confined within the jail liberties, shows a clear and explicit neglect of duty and violation of the statute for which the defendant is liable, and is enough to put the defendant to his defense.

(At Special Term. Before WOODRUFF, Ch. J., January 19th, 1860.)

DEMURRER to complaint, on the ground that the same does not state facts sufficient to constitute a cause of action against the defendant.

The complaint stated the recovery of a judgment by the plaintiff in this Court for $12,588.56 against one Plin White. That the action was brought to recover the amount of a debt fraudulently contracted, the issuing to the defendant of an execution against the property of the said White, and its return by the defendant unsatisfied. That, thereupon, on the 14th of April, 1856, an execution against the person of the said White was duly issued to the defendant, who was then Sheriff, and was delivered to him as Sheriff by which he was required to arrest the said White and commit him to the jail of the county until he should pay the judgment or be discharged according to law. That the defendant, as such Sheriff, arrested the said White on

the said execution and committed him to the said jail. That on the 1st of January, 1859, the defendant's term of office as Sheriff expired, and that a new Sheriff, to wit, John Kelly, was elected Sheriff in his place, and duly qualified and gave the security required by law. That the certificate of the clerk of the city and county under his official seal, that the said Kelly had duly qualified and given security was duly served on the defendant on the 11th day of January, 1859. And that "the defendant did not, within ten days after the service on him of such certificate, deliver to his successor, the said new Sheriff, the said Plin White who then remained in the custody of the said defendant on the said execution confined within the liberties of the jail of the city and county of New York."

Wherefore, the plaintiff prays judgment for the sum of $12,-588.56, with interest thereon; damages by him sustained by reason of the premises, with his costs, &c.

A. J. Vanderpool, for the defendant in support of the demurrer.

I. The plaintiff has not shown a valid execution against the person. The complaint does not aver that an order of arrest was obtained, nor a judgment for a cause of action which *per se* warrants an arrest, nor facts showing that an order of arrest might have been obtained. (*Corwin* v. *Freeland*, 2 Seld., 560; 6 How., 241; *Alden* v. *Carsen*, 4 Abb., 102.)

Whenever the execution is void, that is a defense to the Sheriff. (*Jones* v. *Pope*, 1 Saund. R., 38 [6]; *Turner* v. *Eyles*, 3 Bos. & Pul., 456; *Brazier* v. *Jones*, 8 B. & C., 124; *Edwards* v. *Lucas*, 5 id., 339; *Ginochio* v. *Orser*, 1 Abb., 433.)

The allegation that the action was brought to recover the amount of a debt fraudulently contracted is not sufficient. A demurrer admits only facts which are well pleaded. (*Wells* v. *Jewett*, 11 How., 242; *Graham* v. *Machado*, 6 Duer, 514; *Lawrence* v. *Wright*, 2 id., 673.)

II. The question, what is an escape, is now defined by statute. (2 R. S., 434, § 47, 437, §§ 61–63; 3 id., 746, note to § 47.)

Escapes must now be actual. (*Johnson* v. *Macon*, 1 Wash. R., [Ct. of App., Va.] 4.)

White did not escape. No escape is alleged.

III. The failure of the old Sheriff to deliver over the prisoner does not relieve him from custody. The new Sheriff may take him and may compel the delivery of the process, &c. (2 R. S., 439, § 73.)

The statute gives no action against the Sheriff for not delivering, nor has it declared that it shall be deemed an escape. Such neglect does not work a general jail delivery.

Until the prisoners are delivered they remain in the custody of the old Sheriff. (*Hempstead* v. *Weed*, 20 J. R., 64; *Curry* v. *Worthy*, 2 Jones [N. C.] R., 104.) Our statute is only declaratory of the common law rule. (See Revisers' Notes, 3 R. S., 748, note to § 69; *Partridge* v. *Westervelt*, 13 Wend., 500; *Arthur* v. *Bokenham*, 11 Mod., 150; see also *Hinds* v. *Doubleday*, 21 Wend., 223; 28 Barb., 614.)

Jno. E. Parsons, for the plaintiff.

I. The statute peremptorily requires the old Sheriff to deliver to his successor all persons confined, &c., within ten days after service of the certificate of the County Clerk. (2 R. S., 438, §§ 88, 89, 90.)

II. A person confined on civil process, if not so delivered to the new Sheriff, is at liberty to go at large, and the new Sheriff cannot control him. (*Hinds* v. *Doubleday*, 21 Wend., 223; *Partridge* v. *Westervelt*, 13 id., 500; Crocker on Sheriff, 5, § 7.)

WOODRUFF, J. 1. The 179th section of the Code of Procedure authorizes the arrest of a defendant when he has been guilty of a fraud in contracting the debt for which the action is brought. The 288th section provides that an execution against the person of the judgment debtor may be issued "if the action be one in which the defendant might have been arrested as provided in section 179."

The averment that the plaintiff recovered a judgment in an action against the defendant therein, which action was brought to recover the amount of a debt fraudulently contracted, shows a case in which, therefore, by the terms of sections 179 and 288, the plaintiff had a right to have an execution against the person of the defendant. The court had jurisdiction of such an action, and power to issue such an execution in the case which is stated.

The further averment, that the execution was *duly* issued, is, at most, all that is, as against the Sheriff, necessary to show that it was his duty to execute the writ. Such an execution is regular on its face, and is issued by competent authority; and, upon the facts alleged, the plaintiff was, *prima facie*, entitled thereto.

If it was necessary to the regularity of an execution against the person of the debtor that an order of arrest should have been previously obtained, it does not follow that such an execution would be void though issued without such an order. That question relates to the regularity of the process, and to its legal validity, as against the debtor. He may acquiesce therein, or may move to discharge the process; but where there is no defect of jurisdiction, neither irregularity nor error in issuing the execution will justify the Sheriff in refusing or neglecting to execute it.

This doctrine has been often discussed in the analogous case of actions against a Sheriff for the escape of a prisoner taken on a *ca. sa.* In such an action, the Sheriff cannot require the plaintiff to allege affirmatively the successive steps upon which the regularity of the process depends, no more than, on refusal to execute an order of arrest before judgment, he can require the plaintiff to allege that the Justice approved the sureties taken on granting such an order. As to the Sheriff, the process being regular on its face, and the Court or Justice having jurisdiction, *omnia presumuntur rite esse acta.*

This distinction between void process and that which is irregular, erroneous and voidable, is familiar, and was substantially conceded on the argument. (*Bushe's case*, Cro. Eliz., 188, where a *ca. sa.* had been issued more than a year and a day after judgment without a previous *sci. fa.*; *Shirley* v. *Wright*, 2 Salk., 700; *Jaques* v. *Cesar*, 2 Saund., 101, *e*, note 2, p. 101, *y*; *Bissell* v. *Kip*, 5 Johns., 100; *Jackson* v. *Walker*, 4 Wend., 464; *Ontario Bank* v. *Hallett*, 8 Cow., 192; *Savacool* v. *Boughton*, 5 Wend., 170; *Ames* v. *Webbers*, 8 id., 545; *Parmelee* v. *Hitchcock*, 12 id., 96; *Ginochio* v. *Orser*, 1 Abb., 433.)

To this view of the subject it may be added that, if there exist extrinsic facts which, being shown, render the arrest invalid, the Sheriff must show them as a defense; so that, if the want of an order of arrest, made before judgment, would entitle the debtor to be discharged or to set aside the execution, and it were conceded

that that would avail the Sheriff as an excuse for not detaining him, it is matter of defense.

2. In regard to the gravamen of the action, to wit, the averment that the defendant (the Sheriff) did not deliver the debtor, then being in custody, &c., to his successor, the new Sheriff, the complaint states the expiration of the defendant's term, the election of his successor, that the latter qualified and gave the security required by law, and that the Clerk of the county granted the certificate of such qualification and the giving of security by the new Sheriff, and the service of such certificate on the defendant.

The statute provides that, "upon the service of such certificate on the former Sheriff, his powers as such Sheriff, (except when otherwise expressly provided by law,) shall cease," (2 R. S., 438, § 89 [68];) and, "within ten days after the service of such certificate upon such former Sheriff, he shall deliver to his successor, 1st, the jail * * *; 2d, all prisoners then confined in such jail; 3d, all process * * * authorizing or relating to the confinement of such prisoners; * * *." (Id., § 90 [69].) Section 91 [70] provides for the execution of an instrument reciting the property, process, prisoners, &c., delivered. And section 94 [73] authorizes the new Sheriff, in case the other neglects or refuses to deliver, to take possession of the jail and custody of the prisoners, and to compel the delivery to him of such process and documents.

The statute has thus explicitly defined the duty of the defendant. The plaintiff had an interest in his performance of that duty, by delivering the plaintiff's debtor, held by him in execution of the judgment, to the new Sheriff. In the case of *Hinds* v. *Doubleday*, (21 Wend., 228,) where the prisoner, as in this case, was on the limits or liberties of the jail, Bronson, J., expresses a decided opinion that, after the expiration of the ten days, if there be no assignment of the prisoner to the new Sheriff, the latter cannot detain him, and that he is no longer in the custody of the old Sheriff, whose power over him is at an end; that, in such case, the prisoner may go at large.

It is not necessary to sustain the present complaint that the power of the new Sheriff to take the prisoner should be denied. It is sufficient to say, that the averment that the defendant (the Sheriff) did not deliver the debtor held under the execution to

his successor in office, shows a clear and explicit violation of the statute and breach of the duty which the defendant owed to the plaintiff. For this the defendant is, *prima facie*, liable. This is enough to put him to his defense. He is, in every aspect of the case, (this averment being admitted, and no excuse or avoidance of liability being set up,) liable to nominal damages at least.

If, in truth, the defendant, by delivery of the jail, and the execution of an instrument reciting the property, process and prisoners delivered, complied with the statute, that will be a subject of proof on denial of the plaintiff's averment.

If the prisoner remained in custody under such circumstances that the new Sheriff had a right to hold him, and did hold him, or if the new Sheriff did, notwithstanding the neglect of the defendant to deliver him, take the prisoner into his possession under section [73] 94 of the statute in such wise that he had a right to detain him, and does detain him in custody, this may be available in mitigation of damages or perhaps to show that no damages have been sustained; but, as the case stands in the complaint, a cause of action is shown, to which the defendant is bound to answer, or he is liable.

This is, I think, the necessary result of the provisions of the statute, (2 R. S., 438, 439, §§ [67–73] 88–94,) and the inevitable inference from the opinion of the Court in *Hinds* v. *Doubleday*, above referred to.

The demurrer must be overruled, with costs, with leave to the defendant to withdraw his demurrer and answer within twenty days, on payment of the costs of the demurrer and proceedings thereon.

Ordered accordingly.

JOSIAH CARPENTER, Plaintiff and Appellant v. WM. S. WRIGHT and CYRUS CURTIS, Special Receiver, Respondents.

1. Where a plaintiff, on commencing a suit and obtaining an injunction, gives an undertaking to pay to the defendants such damages as they may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto, the damages to be ascertained by a reference or otherwise, as the Court shall direct, and where, on motion of the defendants, the Court by order dissolves such injunction, and thereupon the plaintiff discontinues the action, and pays the costs, the Court may thereupon order a reference to ascertain the damages sustained by the defendants.
2. Such an order having been made, should not be reversed unless it be perfectly clear that no action will lie on the undertaking.
3. It should not be reversed on the idea that on such a state of facts it is clear the Court has not finally decided that the plaintiff was not entitled to the injunction, and therefore no action will lie on the undertaking.
4. A dissolution of the injunction by order of the Court, upon a hearing of the parties, though on motion, followed by a discontinuance of the action by the plaintiff, makes the order of dissolution a final decision in such sense, that it cannot be reviewed on appeal, nor reinvestigated in that action.

(Before BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF, MONCRIEF and ROBERTSON, J. J.)

Heard, January 28; decided, February 11, 1860.

THIS is an appeal by the plaintiff from an order made by Mr. Justice PIERREPONT, on the 14th of November, 1859. On commencing this action, on the 29th of September, 1859, the plaintiff obtained an injunction restraining the defendants from doing certain acts therein specified, which injunction was served on the defendants. To obtain it, he gave such an undertaking as section 222 of the Code requires. The undertaking declared that the damages secured by it "may be ascertained by a reference, or otherwise, as the Court shall direct."

The injunction, on motion of the defendants, and on a hearing of all the parties, was vacated by order of the Court on the 7th of October, 1859. On the 8th, an order was entered, at the plaintiff's instance, discontinuing the action on payment of costs, which were paid.

Subsequently, and on the 14th of November, 1859, an order was entered on motion of the defendants, and upon notice to the plaintiffs, appointing a referee "to ascertain the damages sustained by the defendants in said action, or either of them, on account or by reason of said injunction, or the issuing thereof," and to report in the premises with all convenient speed. From that order the plaintiff appealed to the General Term.

S. Sanxay, for appellant,

Contended that no action would lie on the undertaking; that the Court had not finally decided that the plaintiff was not entitled to the injunction; that it had not tried the cause upon the merits; and could not hereafter pass upon it, as the cause was out of Court, the action having been discontinued; that there was no authority to make the order appealed from, and it should be reversed. He cited and commented on 7 Abb. Pr. R., 308; 18 N. Y. R., 463; and 14 id., 60.

A. Roe, for respondents,

Insisted that the order of reference was in accordance with established practice, and cited 11 How. Pr. R., 269.

By the Court—Bosworth, Ch. J. The order appealed from should not be vacated, unless it is perfectly clear that no action will lie upon the undertaking. That provides for ascertaining the damages by a reference. The question of liability can be better and more fitly determined in an action upon the undertaking. The reference will settle the measure of liability, if the parties to the undertaking shall be held liable, but not the fact of liability. It has been determined in this action that the plaintiff was not entitled to the injunction. By the plaintiff's acquiescing in that decision, and immediately abandoning his action, that decision became a final one in the action, in such sense, that it cannot be reviewed on appeal, nor be reinvestigated in any other manner in that action. There is, therefore, much reason for considering that decision a final one within the meaning of the undertaking, and of section 222 of the Code.

In *Coates* v. *Coates*, (1 Duer, 664,) the practice was sanctioned which has been pursued in this case. The case in 7 Abb. Pr. R.,

808, contains no intimation in conflict with it. There, no decision had been made upon the question of the plaintiff's right to the injunction. (See 11 How. Pr. R., 269; 12 id., 170.)

In 18 New York Reports, 463, the order of reference was made after a judgment entered dismissing the complaint. I do not think the defendants (if entitled to damages) have lost the right to an assessment by a referee, solely because the action has been discontinued. It is not thereby terminated more absolutely than by a dismissal of the complaint. The order should be affirmed.

Affirmed accordingly.

MARY M. O'BRIEN, Plaintiff and Respondent, *v.* JAMES BOWES, Defendant and Appellant.

1. An action between partners for a dissolution, an accounting, sale of the partnership property, payment of the debts, and a payment to the plaintiff of her share of the residue of the proceeds, is not an action for the recovery of money only, which must be tried by a jury, but it is a suit which would formerly have been a suit in Chancery, in which the Court had power to order a feigned issue, and in which, under the Code, an order may be made for the trial of any questions of fact which are in issue.
2. By the rules of Court, if either party desire a trial by jury in such case, he must, within ten days after issue joined, give notice of a motion therefor. He cannot of right make such motion at a later period.
3. The Court, for its own relief, and of its own motion, before the actual trial of the issues, may invoke the aid of a jury for their determination or for the determination of any questions of fact involved therein. When a cause is called for trial, if it appear that the trial will require the examination of a long account, the Court may order a reference; or if there are questions which ought to be determined before the account is taken, the Court may try and determine those questions, and direct a reference to take and state the account. And so, also, when the cause is called for trial, if difficult questions of fact are involved, depending probably upon conflicting testimony, the Court has power to order those questions to be tried by a jury.
4. But where the action is brought to trial, and is actually tried by the Judge without a jury, each party giving all the testimony he desires respecting

the matters in issue, and the cause is finally submitted for determination, it is too late to order a trial by jury. It is the duty of the Judge to decide the questions submitted, and it is the right of the parties respectively to have such decision.

5. Under the circumstances last stated, an order dismissing the complaint, unless the plaintiff, within five days, apply for a trial of the questions of fact; and an order thereafter made on the plaintiff's application, directing that certain questions in relation to which the testimony was conflicting, be tried by a jury are erroneous, and will be reversed.

(Before BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF, MONCRIEF and ROBERTSON, J. J.)

Heard, January 21st; decided, February 11th, 1860.

APPEALS from orders at Special Term.

It appears by the pleadings, and the orders appealed from, that this is an action brought by the plaintiff, alleging a partnership between herself and the defendant, and praying for a dissolution, an account, a receiver, and sale of the partnership property, the payment of the debts of the firm and a distribution of the residue, and payment to the plaintiff of whatever is found due to her.

The answer denies every material fact alleged, and the issues thus raised were brought to trial.

All the proofs were given by the parties respectively which they desired to give, and they rested, submitting the case to the Court for its determination.

The trial was had at Special Term before Mr. Justice HOFFMAN, without a jury, and after such submission, and after consideration thereupon, on the 20th of June, 1859, he ordered "that the complaint in this action be dismissed without costs, unless the plaintiff apply within five days after the service on her attorneys of a copy of this order for a trial of the questions of fact in this action under the Code, in which case the question of costs is reserved." From so much of this order as annexed a condition to the dismissal; allowing the plaintiff to apply for a trial of the questions of fact, the defendant appealed.

On the 5th day thereafter the plaintiff applied for and obtained an order "that the issues of fact in the action raised by the following questions be tried by a jury, and that said trial be had by submitting to and obtaining the answer of the jury to the following questions;" specifying some of the questions of fact

involved in the issues, and material to the final disposition of the cause, but some only.

From this order the defendant also appealed.

Francis Byrne, for the defendant (appellant),

Cited in support of the appeal, Code of Procedure, (§§ 72, 251, 252, 253, 255, 266,) *Draper* v. *Day*, (11 How. Pr. R., 439,) *Church* v. *Freeman*. (16 id., 294.)

Jno. E. Parsons, for the plaintiff (respondent).

Section 72 of the Code reserves the right to order an issue for trial "in the cases where the power now exists."

The Court of Chancery always had the power of awarding an issue on the hearing where a material fact became doubtful in consequence of conflicting testimony and that power was not taken away by the act of May 2d, 1839. (1 Barb. Ch. Pr., 446; *N. O. Gas Light and Banking Co.* v. *Dudley*, 8 Paige, 452.)

So that Court always had the power to order the hearing of a case to be suspended to enable either party to have any fact established. (1 Barb. Ch. Pr. 322.)

The order of Judge HOFFMAN is to be taken together. It is no decision in the suit, and no appeal can be taken successfully from a portion of it, so that the balance, being left untouched, the General Term would be deciding the case in the name of the Judge at Special Term.

BY THE COURT—WOODRUFF, J. It is clear that this is not an action for the recover of money only, or for any of the relief specified in that section of the Code of Procedure which declares what actions must be tried by a jury. (§ 253.) It seeks other relief and falls within the provisions of that section (254) which declares that "every other issue is triable by the Court, which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury."

It is a suit which under our former system would have been a suit in Chancery, and in which a feigned issue might have been ordered, if doubtful questions of fact arose upon conflicting evidence, and it is therefore a case plainly within the provisions of section 72 of the Code, which provides that "feigned issues are

abolished, and instead thereof, in cases where the power now exists to order a feigned issue, * * * an order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and such order shall be the only authority necessary for a trial."

There was, therefore, no lack of power in the Court to order any question of fact arising upon the issues between the parties to be tried by a jury, and to settle and determine what questions should be so tried.

The ground of the present appeal is, that it was too late to make the order when it was made. That in fact the cause had been tried by the Court without a jury, and nothing remained but to render judgment, and that the parties respectively were entitled as matter of legal right to the decision of the Judge upon the questions submitted to him. Not only so; that in fact the decision was in substance made by declaring that the complaint be dismissed, unless the plaintiff applied for a trial.

The power of the Court to order a trial by jury being clear, the inquiry is, when that order may be made, and at what stage of the proceedings it may not be made?

Rule 33 of the present rules of Court, provide in terms that in cases of this description "if either party shall desire a trial by jury, such parties shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury."

So that by going to trial before a Judge sitting without a jury, the parties plainly lost all right to move for such a trial on that hearing, or to make such a motion at any time afterwards. The order of the 20th of June, permitting the plaintiff to move for a trial by jury, was in direct opposition to the rule, and the motion made in pursuance of that permission was in like manner in conflict with its provisions.

If, however, the Court had power in this stage of the cause, as of its own motion to direct the trial of the questions of fact by the jury, the order should not be reversed merely because the Court authorized the plaintiff to ask for such an order.

That the Court may, for its own relief, at any time before the actual trial of the issues, invoke the aid of a jury for their deter-

mination, or for the determination of any question of fact involved therein, I entertain no doubt.

The power of the Court of Chancery before the Code to do so, was unquestionable, and the terms of the 254th section of the Code above referred to, are broad and unqualified in conferring the power.

And, although the rules of Court have made it the duty of the party, if he desires such a trial, to apply within ten days after issue joined, his neglect to do so no more deprives the Court of the power to seek the aid of a jury for its own relief, than the omission of the parties to apply for a reference renders it necessary for the Court or the Court and jury, to examine a long account at whatever loss of time or however great the inconvenience.

In this respect, I fully agree with Mr. Justice HARRIS in his opinion expressed in *Church* v. *Freeman*. (16 How. Pr. R., 297.)

The Court, when a cause is brought on for trial, if it appear that the trial will require the examination of a long account, may order a reference. Not only so, if there are questions to be settled which ought to be decided as a basis of the reference or as a guide to the conduct of the reference, the Court may undoubtedly hear and determine those questions, and then send the matter to a referee for the taking of the account.

So the Court, when the cause is called for trial, if it see that questions of fact are involved, the determination of which may depend and probably will depend upon conflicting testimony, may order those questions to be tried by a jury. It was a common exercise of the power of a Court of Chancery; the Revised Statutes did not deprive the Court of the power; and the Code, so far from taking it away or restraining its exercise, appears to me to confirm it. (*N. O. Gas Light Co.* v. *Dudley*, 8 Paige, 452; *Gardner* v. *Gardner*, 22 Wend., 536; *Monson* v. *Clarke*, 1 Clark C. R., 580.) It was the usual practice in Chancery to make the application for such a trial, when the cause was brought to a hearing, (18 Ves., 481; 1 Hoff. Ch. Pr., 503; 1 Sim. & Stuart, 366;) and though the rule of Court may now prevent a party from making a motion therefor at that stage of the proceedings, I know of nothing to prevent the exercise of the power by the Court, if the aid of a jury is desired.

But these views are not decisive of the present appeal. In this action there was no application by the parties for a trial by jury. The Court, at the trial, did not order the submission of any questions to a jury. The cause was regularly brought to trial, and was tried before the Judge. All the testimony which either party desired to give respecting the matters in issue was given, and the cause was submitted for determination.

All this having been done, we think all questions respecting the mode of trial were at an end, and it was the duty of the Judge to decide the questions submitted. Not only so, we think it was a right of the parties, respectively, to have his decision.

We are aware that the Court of Chancery was accustomed, when not satisfied by the proofs as they were exhibited, to order a cause to stand over for the production of further proofs. That Court was always open, and such an order was, in substance, continuing or protracting the trial of the cause until the matter was ripe for determination, but even that course did not involve a refusal to decide when all the proofs were in and the case submitted for decision.

Our present system assimilates the practice in all actions, whether at law or in equity. Our courts are held at successive terms, under regulations conformable to the practice of courts of law. A trial cannot regularly be begun in one term and be finished at another. And although it may be allowable to suffer a case to stand over from day to day for further proof when the Judge is sitting without a jury, we think that when the parties have closed their evidence and submitted the cause, the Judge has no alternative; he must decide.

He may—experience teaches that he often does—regret that the responsibility is upon him, and that he cannot rely on a jury to decide under a conflict of evidence and doubts as to the credibility of witnesses, but we think he must decide, and that whatever might have been the powers of a Chancellor, the Code has allowed him no choice.

The 267th section of the Code declares, that upon a trial of a question of fact by the Court, its decision shall be given in writing and filed with the clerk within twenty days after the Court at which the trial took place.

In respect to the time of decision, this may be merely directory, but the duty to decide is absolute and unqualified, and we have no doubt that the right of the party to have a decision, and a decision of the very question tried, is so perfect and absolute, that a mandamus would lie to compel the Judge to make the decision. Nor can the Judge satisfy the law by any order to stand over, or to try the question elsewhere. He must decide the question of fact, and this appears from the words of the section which follows, viz.: "Judgment upon the decision shall be entered accordingly."

It follows from these views that the orders appealed from were erroneous, and so far as appealed from should be reversed.

Ordered accordingly.

RANNEY, Assignee, &c., *v.* STRINGER & TOWNSEND.

1. In an action, brought by an assignee in trust for the benefit of creditors, where such assignee is also a non-resident, the Court may, in its discretion, compel him to file security for costs.
2. An order that he file security may be made, after the plaintiff has taken an appeal from a judgment entered against him in the action.

(At Special Term, February 28, 1860. ROBERTSON, J.)

THE facts are sufficiently stated in the opinion.

J. Graham, for defendants.

H. W. Johnson, for plaintiff.

ROBERTSON, J. This is an application to compel the plaintiff to give security for costs on an appeal from a Special to a General Term, after verdict for the defendant, the plaintiff suing in a representative capacity.

It having been held that an appeal is not a new suit, as a writ of error formerly was, so as to compel security for costs where a party had become a non-resident after the commencement of the original suit, (*Johnson* v. *Yeomans*, 8 How., 140; 7 Wend. R., 434,) it must be equally held to be a continuation of the original action, for the purpose of making a non-resident and his sureties

liable for its costs. Under the 317th section of the Code, the Court may require security to be given by the plaintiff in the cases mentioned in that section; and as this might have been done at any stage of the proceedings in the action, it is not too late to do it now; the rule as to non-residents, where the attorney may be preferred as security not applying. I think the uncontradicted affidavits on the part of the defendants show a case for exercising the discretion allowed in the section in question, and an order must be made directing the plaintiff to file security for costs, or his appeal be dismissed with $10 costs of this motion, to be costs in the cause.

DAVID FOSHAY, Plaintiff and Appellant, *v.* HENRY C. DROST, Defendant and Respondent.

1. Where a motion is made to open a default, as a mere favor to the moving party, an order granting or denying the motion will not be reviewed on appeal.
2. In such case, if the motion be granted upon terms, the conditions upon which the party obtains the favor will not be reviewed on appeal.
3. Hence, where, after a trial and verdict for the plaintiff, the plaintiff's motion for leave to file a reply to the defendant's counterclaim was denied, unless the plaintiff consented to a new trial, and paid all the costs since the answer: *Held*, that the terms imposed on the plaintiff were not the subject of appeal.

(Before HOFFMAN, WOODRUFF, MONCRIEF and ROBERTSON, J. J.)

Heard, March 24th; decided, March 31st, 1860.

THIS is an action brought to recover money alleged to be due for the employment of the defendant and the charter of his vessel, for a voyage to Virginia for oysters. The answer avers that the plaintiff did not perform his contract, and has not refunded the money received for the purchase of the oysters, but so negligently performed the service that the defendant lost $200 of the money which he furnished to the plaintiff for the purchase of the oysters, and sustained by such negligence further damage to the amount of $250, and prays judgment against the plaintiff for the said two sums and interest.

To this answer no reply was filed or served.

The action was brought to trial, and after the plaintiff had rested, the defendant's counsel insisted that he was entitled to judgment for the amounts claimed by him, on the ground that they constituted a counterclaim, and the plaintiff not having replied thereto they were to be deemed admitted. The motion was overruled, and the defendant having given such proofs as he thought proper, the case was submitted to the jury, who, rejecting the counterclaim and finding against the defendant upon the question of due performance by the plaintiff, rendered a verdict for the amount claimed, with interest.

The defendant excepted to the ruling, that he was not entitled to judgment for his alleged counterclaim, and to the submission of any question in relation thereto to the jury, insisting that it was admitted by the failure of the plaintiff to reply; and after the verdict, the defendant made a case on which to move for a new trial.

The plaintiff, after the trial and verdict, moved at Special Term for leave to file a reply *nunc pro tunc*, as of the time the answer was served. On this motion affidavits were read, containing conflicting statements respecting what transpired at the trial—the affidavit on the part of the plaintiff representing that the parties came to trial prepared, and did actually try all questions upon which the rights of the parties depended; that, although the question whether there was a reply or not was raised, it was done by the Judge upon a claim of the plaintiff that the answer was not itself sufficient to admit proof of negligence as a defense, and not by the defendant's counsel, who did not suggest that his defense was admitted until after such inquiry was made and it was found that no reply had been filed; that the Judge refused to then give leave to file a reply, on the ground that such leave could not be given at the trial, but suggested that the trial should proceed and the whole question be tried, and that, on motion at Special Term, to be thereafter made, leave to file a reply *nunc pro tunc* could be obtained. On the other hand, the defendant's affidavit represented that, when the plaintiff rested, he moved for judgment for the amount claimed in his answer for the want of a reply; that the Judge refused to grant such order, but offered to the plaintiff his election that a juror be withdrawn and the cause go off the term and so time be given to apply for

leave to file a reply, or, if the plaintiff deemed the answer insufficient or a reply to be unnecessary, then to go on and try the cause, and, if he recovered a verdict, have an order that the cause be heard on a case in the first instance at General Term upon the defendant's exceptions, and that the plaintiff elected to go on and try the cause, and did obtain a verdict; and that the defendant had made a case whereupon to apply to set aside the verdict and for a new trial.

The plaintiff's motion for leave to file a reply *nunc pro tunc* was heard before Mr. Justice HOFFMAN at Special Term, who, on the 1st March, 1860, ordered that the motion be denied unless the plaintiff file his consent to a new trial and pay all the costs since the answer, including $7 costs of motion, within five days after adjustment.

From so much of the order, as required the plaintiff to consent to a new trial as a condition of granting the motion, the plaintiff appealed.

A. R. Dyett, for the plaintiff (appellant).

I. The parts of the order in question are appealable: the conditions are oppressive. (5 Cow., 15; 10 Wend., 628; 5 Hill, 516.)

II. The parts of the order appealed from are erroneous upon principle and authority: 1. There has been a fair trial of the counterclaim. 2. The defendant was not surprised at the trial: he was fully prepared with his proofs, and gave them to the jury. 3. If the Judge erred in holding the counterclaim not admitted, no injustice was done, since the jury have found that no counterclaim exists, and if there is no injustice there should be no new trial. 4. The fact that defendant has made a case cannot affect the motion. He has other exceptions. An amendment will be allowed, although the effect will be to supersede a bill of exceptions. (2 Cow., 515; 12 Wend., 228; 2 Hall, 545.) 5. There is no necessity for another trial; and it is, therefore, unjust to require it. Had the defendant suggested the point before the trial, a reply would have been filed. He should not be permitted to lie by, and take advantage of a surprise to the plaintiff on the trial.

III. Requiring payment of all the costs was also oppressive. Costs of the motion should only have been imposed. The Court below have practically admitted the sufficiency of plaintiff's ex-

cuse, and yet imposed such terms of granting relief as to work a great injustice. (12 Wend., 135; 1 Hill, 118; 7 Cow., 483; 6 id., 360, 590; 4 id., 394, 503; 1 id., 670; 12 J. R., 353; 18 id., 510; Code, § 174.)

John M. Martin, for the defendant (respondent).

I. The terms on which a discretionary order is granted are not subject of appeal. (3 Code R., 85; 2 id., 41; 10 Barb., 303; 8 Abb., 42.)

The merits are not involved. (3 Code R., 141; 4 Sandf., 709; 3 E. D. Smith, 210; 6 Duer, 689.)

II. The Judge had no power to make an order which should deprive the defendant of the benefit of his exception taken on the trial.

III. The plaintiff's application for leave to file a reply assumes that a reply was necessary; that, without it, the counterclaim of the defendant was admitted. The General Term, on the hearing of the case, will, therefore, grant a new trial for error in not allowing that counterclaim on the former trial. This is, therefore, an attempt to avoid the effect of the election voluntarily made at the trial by the plaintiff, and deprive the defendant of a new trial to which, as matter of law, he is entitled.

IV. The plaintiff was bound to know what was in the pleadings; and no claim that he was surprised will be listened to. (3 Wat. & Gra. on New Trials, 963, and cases cited.)

The appeal should be dismissed.

BY THE COURT—WOODRUFF, J. We regard it as well settled that, where a motion is made to the Court to open a default as a mere favor to the moving party, the power of the Court being conceded, an order, either granting or denying such motion, will not be reviewed on appeal. In such case, no substantial right is violated; for relief from the default in such case is not a matter of right. The motion does not involve the merits; for the opposing party being in all respects regular, no rule of law or practice has been violated, and the merits of the action are not the questions in any wise to be determined on such a motion. (*Bolton* v. *Depeyster*, 3 Code R., 141; *Fort* v. *Bard*, 1 Comst., 43; *Mead* v. *Mead*, 2 E. D. Smith, 223.)

In *Thompson* v. *Starkweather*, (2 Code R., 41,) the precise point that "an order refusing leave to reply after the time for replying had passed, is not the subject of appeal to the General Term," was adjudged.

If these cases be taken as our guide, then it is clear that, in this case, if the Justice at Special Term had refused the plaintiff's motion for leave to file a replication *nunc pro tunc*, as of a day before the trial, the Court in General Term would not review the order, but an appeal therefrom would be dismissed. And it is quite obvious that, if we could not hear an appeal by the plaintiff from an unqualified denial of the motion, we cannot on his appeal review an order granting it upon terms. If such order of denial be not appealable, much less is an order imposing terms of granting the favor.

Without further discussion of the general question, it must suffice to say that it is settled in this Court that where a motion is addressed to the discretion of the Court by a party seeking a favor, the terms upon which the favor is granted are not a subject of appeal. It was so distinctly held in *Gale* v. *Vernon*, (4 Sandf., 709,) where the plaintiff was in default for not bringing his cause to trial, and was relieved upon terms of paying costs. And in *Jacobs* v. *Marshall*, (6 Duer, 689,) where a defendant was required to waive the defense of usury as a condition of opening a default for want of an answer, we held that, in respect of the conditions on which the default was opened, the decision at Special Term was final, and could not be reviewed on appeal. A default in not filing a reply, stands upon no more favorable footing for the party in default. (See also 3 E. D. Smith, 210.)

The cases cited, (5 Cow., 15; 10 Wend., 628,) in which the imposition of extraordinary terms, as a condition of putting off a cause at the Circuit, was reviewed in the Supreme Court, are not in conflict with these views. When the practice in a particular case has been long settled, it becomes binding as the rule governing the subject. Such was the practice respecting the putting off of causes at the Circuit, and it was because the Court held that, when the applicant brought himself within the rule, the Circuit Judge no longer had a discretion to exercise; that they held the imposition of unusual terms erroneous.

Reasons might be suggested why the order is not justly characterized as a harsh order. Especially since the plaintiff voluntarily went on with his trial, in spite of the objection, and refused the offer of the Judge to permit a juror to be withdrawn; but it is sufficient to say that we do not review the order, in respect to the terms imposed, as a condition of granting a favor.

The appeal should be dismissed.

ROGERS v. DEGEN et al.

1. Where an action, at issue on questions of fact, is noticed for trial, and when reached in its order on the calendar, the complaint is dismissed by reason of the failure of the plaintiff to appear, an allowance under section 309 of the Code may he made, if the action be a difficult or extraordinary one.
2. The word trial as used in that section, and in section 307, subdivision 4, has a wider meaning than is imported by the words, "the judicial examination of the issues between the parties."

(At Special Term, April, 1860. Before ROBERTSON, J.)

THE facts of this case are fully stated in the opinion of the Court.

ROBERTSON, J. The motion in this case is for an allowance under section 309, upon the dismissal of the complaint by default, upon proof of service of notice of trial of issues of law when the cause was reached in its order on the calendar, and the question whether an allowance can be made, must turn upon that other, whether such judgment by default is "a trial" within the meaning of that section. It is very evident that the allowance is not given as a trial fee alone, or counsel fee for trying the cause, (*McQuade* v. *N. Y. & Erie R. R.*, 5 Duer, 613,) because it is the difficult and extraordinary character of the case, not of the trial which determines the right to the allowance; the mere trial alone forms by itself a contingency on which the right of an allowance depends, because section 322 excludes it upon a settlement before judgment, whereas, after a trial, costs follow to be included in the judgment. The only remaining question is solved by the Code; and here I do not think the definition in

section 252 is strictly applicable as there can hardly be said to be a "judicial examination" when the default of a party is taken; but in regard to costs, and indemnity of expenses, I think the term has a wider meaning, and this being a modified continuation of a prior fee bill, in which "trial" included every mode of disposing of issues in a cause. In this sense it is used in section 307 of the Code, where under the 4th subdivision it has been held that the word "trial" as applied to issues of fact, included judgments by default, (*Dodd* v. *Curry*, 2 Code R., 69; *S. C.*, 4 How., 123,) and it certainly must include similar judgments in issues of law mentioned in the same subdivision, and such was the view undoubtedly taken in *Lawrence* v. *Davis*. (7 How. Pr. R., 354.) The fact that no evidence is taken, or other proceedings are had on a trial, is immaterial. (*Shannon* v. *Brower*, 2 Abb. Pr. R., 377.) The only effect of want of litigation on the trial would be to reduce the amount of counsel fee, or extra allowance, not to defeat the right to it altogether.

I think this a proper case for an allowance of five per cent on the amount claimed.

THOMAS MCDOWELL, Plaintiff and Respondent, *v.* THE SECOND AVENUE RAILROAD COMPANY, Appellants.

1. A settlement of an action made by the parties before trial if made *bona fide* by the defendant, without any intent to deprive the plaintiff's attorney of his costs, is valid; and if the attorney proceed and perfect judgment after notice of such a settlement, the judgment will be set aside as irregular.
2. As between the parties to an action, an attorney, as such, has no lien upon the subject of the action, and the parties may settle and discharge it before judgment without consulting him, if there be no collusion between them to deprive him of his costs.

(Before BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF, PIERREPONT, MONCRIEF and ROBERTSON, J. J.)

Heard, May 26th; decided, June 2d, 1860.

THIS is an appeal by the defendants from an order made in this action on the 7th of April, 1860, by Mr. Justice MONCRIEF.

The action was commenced in January, 1860, to recover for the loss of services of plaintiff's infant daughter, alleged to result from injuries caused to her by the negligence of the defendants' servants. On the 16th of January, 1860, a settlement was had between the plaintiff and defendants, and the former, in consideration of the payment of $75, the sum agreed upon, executed and delivered to the defendants a full release of the cause of action, which release contained this clause, viz.: "all actions at law, or otherwise, are hereby discontinued without costs to either party."

On the twentieth day after service of the summons and complaint, the following written notice was served on the plaintiff's attorney, viz.:

"D. B. TAYLOR, Esq.:

"Dear Sir—The claim of Thomas McDowell against this Company has been settled, and we hold the release of the same.

"Very respectfully,

"JOHN O'BRIEN, Treasurer."

John O'Brien was then the defendants' treasurer. The plaintiff's attorney makes affidavit that it was agreed between him and the plaintiff, when the suit was commenced, that he should have half of any sum that might be recovered, for his services in the suit, and that if nothing was recovered he was not to demand any compensation, and that he told the person who delivered the said notice of settlement to him, "that that was not the proper way to treat him about a settlement of said action; * * * that he held a lien on said action, and that, under the circumstances, he should not regard the note then handed to him."

The attorney of the plaintiff proceeded in the action, took judgment by default for want of an answer, had the plaintiff's damages assessed and the costs taxed, and perfected judgment and issued execution. The damages were assessed at $1,000. Judgment was perfected March 14, 1860, for $1,025.41, damages and costs. On the 28th of said March, the defendants obtained an order to show cause why the judgment and execution should not be set aside.

There was nothing in the motion papers tending to show that the defendants had, at the time of the settlement, any notice

of the said agreement between the plaintiff and his attorney; nor that it was any part of the defendants' motive in settling to deprive the attorney of his costs, unless such motive may be inferred from the fact that the settlement was made without consulting the attorney in relation to it.

On the 7th of April, 1860, after hearing both parties on the order to show cause, an order was made setting aside the judgment and execution on paying to the attorney his costs as adjusted, and the Sheriff's fees on said execution; that otherwise the motion to set them aside be denied, with $7 costs to the plaintiff.

From that order the present appeal is taken.

John Slosson, for appellants.

D. B. Taylor, for respondent.

HOFFMAN, J. The subject of the present appeal is one of importance, and as considerable difference of views appears to exist, especially in late decisions, we have examined the points with some care.

As long ago as the year 1805, it was settled in our State, that if a defendant has *bona fide* paid the debt and costs to the plaintiff, and got a full discharge, without notice from the attorney of his claim, and without collusion to defraud him, it is valid, and a judgment taken by the attorney would be set aside on motion. If the adverse party applied to cancel the judgment by a set-off, then the Court would take care that the attorney's bill be paid. (*Pinder* v. *Morris*, 3 Caines' T. R., 165.)

In *The People* v. *Hardenbergh*, (8 Johns. R., 335,) a settlement of costs awarded to defendant in ejectment, made without notice from the attorney, and without collusion, was held valid, and an attachment set aside.

Martin v. *Hawks*, (15 Johns. R., 405,) was the case of a judgment for plaintiff for six cents damages and costs; notice to the defendant by the attorney to pay over the judgment to him, and a *ca. sa.* directing the Sheriff to pay the amount made to him. It was held that the attorney had a lien on the judgment for his costs, and stood with the same equity as if the judgment had been assigned to him, and he could not be defrauded of such

lien and equity when all the parties were informed of it, and forbidden to do any act to prejudice it. The Sheriff, therefore, could not avail himself of a release by the original plaintiffs in an action for an escape.

Power v. *Kent*, (1 Cow. R., 172,) is to the same effect, there being judgment on a demurrer, disposing of the whole cause of action, with written notice from the attorney of his claim to the costs, and forbidding any arrangement without him, before the settlement made by the parties.

In *Ten Broeck* v. *De Witt*, (10 Wend., 617,) the defendant paid damages and costs to the plaintiff, after being apprised by a counsellor of the court that the plaintiff was not authorized to receive the costs. The court refused to set aside an execution; holding that the information given to the defendant was equivalent to a notice from the attorney not to pay the costs to the plaintiff.

The following subsequent cases, before and since the Code, have been examined: *Talcott* v. *Bronson*, (4 Paige, 501,) *Sweet* v. *Bartlett*, (4 Sandf. S. C. R., 661,) *Brown* v. *Comstock*, (10 Barb., 67,) *Haight* v. *Holcomb*, (16 How. Pr. R., 173,) *Ward*, v. *Syme*, 9 id., 16,) *Sherwood* v. *The Buffalo City Railroad Company*, (12 id., 136,) *Rooney* v. *The Second Avenue Railroad Company*. (18 N. Y. R., 368.) They sustain the proposition thus stated in *Shank* v. *Shoemaker*, (18 N. Y. R., 489:) "The claim of the attorney for the appellant for his costs had not been perfected by a judgment. There is no case which goes far enough to show that a party who has not obtained a judgment in his favor cannot settle a suit because it may prejudice the possibility, or even probability, that his attorney might obtain his costs by a future trial, and a judgment in favor of his client."

It seems undeniable, that, in our State, the points laid down in the early case from Caines' Reports (*ut supra*) are the rules in force to this day, with the addition that a settlement of the debt, without receipt of the costs, stands precisely upon the same footing as the payment of both debt and costs in that case to the client.

And the English cases correspond with, and support, these rules.

The lien of an attorney upon a judgment is established. No set-off of cross-judgments can be had after one has been obtained in the suit in which he acts. No settlement will then avail against

his rights. (*Dowett* v. *Hollyer*, 2 Dowl. Pr. Cas., 540; *Caddell* v. *Smart*, 4 id., 760.)

But, even then, the attorney is far from being constituted *Dominus Litis.* He cannot carry a judgment into effect against the order of his client. (*Barker* v. *St. Quentin*, 12 Mees. & Wels., 441.) If the client chooses to discharge the debt, or from imprisonment on execution, the attorney cannot prevent it. (*Marr* v. *Smith*, 4 Barn. & Ald., 466.)

So, if the attorney gives notice to the opposite party that he looks to the proceeds of the action for payment of his costs, and directing payment to himself, or forbidding it to be made to any other, a settlement without payment will not be effectual. Lord MANSFIELD, in *Welsh* v. *Hole*, (1 Doug., 238,) said, that it was like paying a debt to A, after notice that it had been assigned to B. The case of *Read* v. *Dupper*, (6 T. R., 361,) is explicit to the same point, and it is recognized by COLTMAN, J., in *Francis* v. *Webb*. (7 C. B. R., 731.)

And so, if the plaintiff, before judgment, chooses to release or compromise the action, without the intervention of his attorney, and without regard to his costs, he may do so; and, provided there be no collusion, fraud, or *mala fides* in the opposite party, the prospective lien of the attorney is lost. (*Chapman* v. *Haw*, 1 Taunt., 341; *Rooke* v. *Wasp*, 5 Bing., 190; *Nelson* v. *Wilson*, 6 id., 568; *Clark* v. *Smith*, 6 Mann. & Gran., 1051; *Francis* v. *Webb*. 7 C. B. R., 731.)

It is clear, I think, that, in the most favorable view for the attorney in this case, and assuming that he can, in opposition to this motion, justify his proceeding on the ground of collusion, this remains the only question open for consideration. Has he made out a case of that nature?

Some authorities may be referred to. In *Cole* v. *Bennet*, (6 Price, 15,) after service of process in the action, the defendant purchased some articles of the plaintiff, for which he paid and took a receipt, in which was introduced a memorandum that no further proceedings were to be had in the action which had been commenced, each party to pay his own costs. The defendant then swore that, after he had got notice of service of notice of the declaration having been put upon the door of his former dwelling, he called on the solicitor and showed him the memorandum,

who observed that the defendant should have settled with him. The attorney swore that the defendant had requested time, after being served with process; that some little time before interlocutory judgment was signed, the defendant acknowledged receipt of the notice of declaration; said he had paid the plaintiff the debt, without mentioning the other matter of dealing between them, or showing him the memorandum; and the deponent then informed the defendant that unless his costs were paid he should proceed in the action. On the writ of inquiry, he had taken nominal damages only. He believed there was collusion, and was informed that the plaintiff had gone to America.

The Court put the decision on the ground of there being collusion, and say, all the cases proceed on the ground that the parties are not to be permitted, by any such collusion, to cheat the attorney. The motion to set aside the proceedings was denied.

In *Francis* v. *Webb*, (7 C. B. R., 731,) the Court said: "In cases of this sort, the Court requires a clear case of collusion to be made out before they will, at the instance of the plaintiff's attorney, interfere to prevent effect being given to an adjustment of the dispute between the parties themselves. There was nothing in the affidavits to show that the party entertained the design to deprive the plaintiff's attorney of his costs. The conduct of the plaintiff, (who was a pauper plaintiff,) was very ungenerous towards his attorney; and if we could discover any evidence of collusion on the part of the defendant, I should feel satisfaction in visiting him with costs. It was no part of the defendant's duty to see that the attorney's costs were paid." COLTMAN, J., said: "If there had been notice not to settle without paying the costs, I should have thought the affidavits would have made a case of collusion. But there was nothing to lead the defendant to suppose that a fraud would be committed by the plaintiff on his attorney."

In *Clark* v. *Smith*, (6 Mann. & Gran., 1051,) a verdict had been given for £78.5*s.* 6*d.* damages and costs. The parties then settled for fifty guineas, and a release was given. Judgment was then entered up by the attorney. A motion was made to set it aside, with costs, to be paid by the attorney. The Chief Justice said: "The Court must clearly see, that the defendant fraudulently colluded with the plaintiff to defeat the attorney's lien. Suspicious circumstances were not enough." MAULE, J., said: "The plain-

tiff and defendant settled in the absence of their attorneys. The plaintiff's attorney had, therefore, no right to sign judgment. It lies upon him to show why it should not be set aside. The ground he goes upon is, fraudulent collusion. I think the affidavits, which are, in some respects, contradictory, leave that matter quite uncertain."

In *Nelson* v. *Wilson*, (6 Bing., 568,) Chief Justice TINDAL said: "It is undoubtedly competent for the party to settle the cause without the intervention of his attorney; and, if the attorney proceeds, in order to secure his costs, he is bound to make out a clear case of collusion between the plaintiff and defendant to deprive him of them. Upon reading the affidavits, we think that, though there is ground for suspicion, the collusion has not been clearly made out." A verdict had been taken after notice of the settlement; and all the proceedings were set aside, with costs, to be paid by the attorney.

In a late case in Georgia, (*McDonald* v. *Napier*, 14 Ga. R., 89,) the subject has been carefully considered. The following are the propositions established:

1. The attorney has a special lien upon the money of his client which may come into his hands, and upon a judgment procured by him for his client. If the money is in his hands he may retain it in satisfaction of his bill, and if in the hands of the officer of the Court, the Court in the exercise of its equitable power, (I mean a Court of law,) will lay hold of it and prevent its payment over until his lien is satisfied.

2. If the defendant pay to the plaintiff the debt and costs due on a judgment, after notice from the attorney of the plaintiff not to do so, he will pay it in his own wrong and is liable to pay to the attorney his fees notwithstanding.

3. A settlement between the parties, with a view to defraud the attorney out of his fees, will not discharge the defendant from liability to pay them, or extinguish the judgment as to them, even without notice; yet, if the parties without notice *bona fide* settle or compromise the debt and costs, the attorney cannot afterwards proceed against the defendant for his costs.

4. And in case of a collusive settlement of a cause, the attorney may proceed in the cause for the mere purpose of obtaining his costs. These propositions, I am clear, may be considered as

settled law in England, and have been recognized as law very generally in our States. They are settled in the Courts of Law and Chancery.

5. The lien on the money of a client is limited to the bill of costs accruing to the attorney or solicitor in the case in which it is raised, and the lien on a judgment is in like manner restricted. An execution issued upon a valid judgment in the hands of the attorney is a paper belonging to the client, upon which a lien for a general balance will attach as well as upon any other paper. At the same time it is to be noted that the security which the execution gives for fees, is not the mere right of detention until they are paid, but a process available for their collection out of the defendant. I do not see why it should not be detained as against the plaintiff for a general balance, whilst it is clear that in case of a settlement by the defendant with notice, or without it collusively, the judgment cannot be enforced against him for more than the fees due in the particular case. It is important too that in reference to the lien of the attorney on the judgment, his power over it should be well understood. Because he has the lien stated, it is not to be understood that it supersedes all control which the plaintiff has over it, and that the attorney as *dominus litis* can "marshal the proceedings on the judgment as he may think fit." The lien amounts to this that he has a right to control it for the collection of fees through an order of the Court directing its use for that purpose in the exercise of an equitable power which appertains to it over its own process, and over the lien of its officers.

Tested by the rules thus declared, it is impossible to say that upon these affidavits the defendants did, in making the settlement, act with the design of aiding the plaintiff in depriving the attorney of his costs. If the facts here made out a case of collusion, it would be difficult to imagine a case in which a settlement without the privity of the attorney could be made.

It is, however, necessary to notice some cases which seem to conflict with the long line of authorities I have cited.

The case; *Keenan* v. *Dorflinger*, December 16th, 1859, in the Supreme Court, to which we have been referred, was one of a settlement between the parties after a report of a Referee against the defendant for the sum of $500. Then a release and a consent to

discontinue without costs, were given. The Court denied the motion to discontinue absolutely, but allowed it on payment of costs.

A report of a Referee on all the issues upon which a judgment may immediately be entered, may be deemed upon this question equivalent to a judgment. (See *Sweet* v. *Bartlett*, 4 Sandf. S. C. R., 661.)

In *Owen* v. *Mason*, (18 How. Pr. R., 156,) there was a motion by the defendant to set aside an inquest for irregularity. When the cause was moved for trial, an attorney on behalf of the plaintiff, but not the one on the record, stated that the action had been settled by the parties, to which the defendant's attorney assented, and moved to dismiss the complaint without costs. The attorney of the plaintiff on the record objected, producing a notice of lien served upon the defendant, forbidding a settlement except with him, and moved for judgment for the amount of his costs. The motion of the defendant was denied, and Justice INGRAHAM intimated that he should move to file a supplemental answer, setting up the settlement, and that the Court would then make it a condition that all the costs up to the settlement be paid. No motion was made by him. When the cause was next reached, the plaintiff's attorney took an inquest, perfected judgment, and issued execution for $77, the amount of his costs. A motion to vacate the inquest and execution was denied by Justice MULLEN. If, as we are probably warranted in supposing, the notice had been served upon the defendant before the trial, the case is entirely consistent with the other authorities.

There is also the case of *Wood* v. *The Trustees of the North West Presbyterian Church*, (7 Abb., 210, note,) in which the settlement was made the day before the trial, and a receipt in full given. The plaintiff's attorney went on knowing of the settlement, and took judgment, the defendant not appearing. He issued execution for his costs as adjusted. It was held by Justice HILTON that the judgment could not be vacated. The defendant could only set up the settlement by supplemental answer, and the Court would only allow this upon payment of costs to the time.

It is stated by a late writer on the English practice, (Lush's Practice by Stephens, p. 226,) "that it is the proper and safe course (except perhaps in clear cases of fraud and collusion) for the attorney whose lien has been destroyed by the conduct of

the parties to the suit to apply to the Court for a rule calling on the opposite party to pay him his costs, and not himself to go on with the proceedings." He cites *Graves* v. *Eades*, (5 Taunt., 429,) and *Welsh* v. *Hole*, (*ut supra*,) with other authorities.

The result of the cases, and in our judgment, the sound rule upon the subject is, that if an attorney has omitted to protect himself by a notice forbidding a settlement without him, and the parties compromise the action before judgment, of which he has notice, he then proceeds in the suit for his costs, at the peril of establishing conclusively that the adverse party had the design when making the settlement of defeating his demand for the costs. If he fail in satisfying the Court of this, his proceedings, subsequent to notice, will be set aside. In the present instance, the plaintiff's attorney has failed in making out such a case.

The order below must be reversed without costs, and the judgment and execution must be set aside.

The other Judges (except ROBERTSON, J., who dissented) concurred in the views stated, in the concluding part of the opinion of Judge HOFFMAN.[1]

ROBERT B. BYASS *v.* JOHN OGDEN SMITH.

1. Upon the trial of an action brought to recover, or upon a reference ordered to ascertain the damages sustained by the plaintiff, by the use by the defendant of the plaintiff's trade mark; the defendant cannot be compelled to answer questions tending to show that the defendant has sold articles manufactured by himself, with a label thereon imitating, resembling or purporting to be the label of the plaintiff.
2. A party cannot be compelled to give evidence tending to prove either of the three facts essential to constitute the offense prohibited by chapter 123, (§ 3,) of the Session Laws of 1850.

(At Chambers, July 6th, 1860. Before ROBERTSON, J.)

THE facts sufficiently appear in the following opinion:

ROBERTSON, J. This is a motion for an attachment against the defendant for not answering certain questions put to him

[1] See *The People* v. *New York Common Pleas* (13 Wend., 649, 655).

upon an examination before a referee, and not producing certain books.

The complaint alleges that the plaintiff has been for several years engaged in preparing and vending a commodity designated in the market as "Byass' London Porter," put up in glass bottles, upon which labels are affixed by the plaintiff as a trade mark, containing various devices, and also a *fac simile* of the plaintiff's signature; that he has acquired a great reputation for such porter; that the defendant has been engaged in putting up American porter in bottles similar to the plaintiff's, upon which he put labels similar to the plaintiff's, and also in selling porter; imitating the plaintiff's bottles, casks and trade mark, with the intention of injuring the plaintiff. The demand for relief in the complaint is for an order restraining the defendant, among other things, from selling any imitation of the plaintiff's porter.

The answer denies any knowledge by the defendant that he ever knew such label to be the property of the plaintiff, or that he ever had any intention of injuring or defrauding him.

The issues joined in this action were brought to trial, and the defendant was called as a witness for the plaintiff, on such trial. He then testified that he had sold porter bottled by him with a label resembling the plaintiff's, but never sold it for genuine Byass' porter; and the defendant's counsel proved by one of the plaintiff's witnesses that the plaintiff was not a manufacturer of the porter bottled and sold by him.

After such trial the Court ordered a reference to a referee, to report the amount of damages, if any, sustained by the plaintiff by reason of the defendant's use of the plaintiff's trade mark; in the proceedings, upon such reference, the defendant was asked five questions by the plaintiff's counsel, which were as follows:

1. When did you first begin to bottle and sell American porter put up and labeled as the plaintiff's porter?

2. Have you sold porter at any time put up and labeled like the plaintiff's, as and for an imitation of the plaintiff's porter?

3. Have you, within the last five or six years, copied any such bill in any book or books?

4. Have you ever copied any bill of Byass' imitation porter sold by you, into any book?

5. When you sold Byass' imitation porter, were you accustomed to make out bills in the form of exhibit No. 2?

This exhibit was a bill for porter called "Im't Byass' Porter."

The witness refused to answer such questions, and the objection now taken is, that the answers would tend to criminate the witness. The offense which it is claimed such answers would tend to prove, is that prohibited by an act passed in 1850. (Sess. L. 1850, ch. 123, § 3.) This statute declares that any person who shall vend any goods, &c., having thereon any counterfeited labels purporting to be those of any mechanic or manufacturer, knowing the same to be counterfeited, and purporting to be imitations of such labels, without disclosing the fact to the purchaser, shall be guilty of a misdemeanor. To this it is answered, that the answers given by the witness would not tend to prove any of the facts necessary to make out such offense; that the plaintiff is not a manufacturer or mechanic, within the meaning of the act; that other testimony in the case shows he was innocent of any such offense, and that he waived his privilege by having answered some questions relative to the same facts upon the trial. There are three essential ingredients in the offense, to wit: First, the selling the goods with the simulated marks on them; second, the knowledge of their character; and the third, withholding such knowledge from such purchasers. Whatever tends to prove any one of these, the witness had a right to refuse to disclose. I do not understand that in the privilege of a witness to refuse to answer, because his answer would criminate himself, is embraced any right, on his part, to determine the question of the tendency of his testimony, but that he pleads that his answer may be such as to criminate him, if any answer to the question put would do so. The Court is to determine, as a question of law, whether the question, if answered in any form, would form a link in the chain of evidence; the oath of the witness, therefore, is unnecessary to the fact that his answer must criminate him; by such an oath he would either swear to a conclusion of law, or admit impliedly the very fact he was endeavoring to conceal. Of course the answers in these cases would tend to prove the first ingredient of the offense, to wit: the selling of the goods; and whatever may be the evidence, in this case, of the absence of other ingredients, or even of a complete defense to the charge, that

evidence might not be produced, or defense made out on a criminal charge. I do not think that the defendant, by not claiming his privilege in other proceedings in the cause, waived it, in the proceedings before the Referee, because such evidence could not affect the referee's judgment, unless introduced as an admission. Every admission in a cause may have its explanation and excuse, and the defendant could not be called on to answer questions tending to convict him, even if already convicted. The only remaining question is, whether the plaintiff comes within the description of persons mentioned in the act, against whose interests the offense may be committed. There are two classes mentioned—mechanics and manufacturers—and perhaps the question whether the plaintiff is either, is not to be determined by what appears in this action; the plaintiff may be the manufacturer of the porter sold, upon the bottles containing which the false labels may be pasted.

He has alleged in the complaint that he prepared the porter he sold, and the word "manufacturer" can hardly be intended to be limited to those who actually produced the raw material sold, but must extend to those who put it in a vendible shape and sell it in that shape, using labels to designate by whom it was so prepared and sold. I, therefore, am of opinion the defendant might bring himself, by his answer, within the peril of the statute.

The witness, was therefore, justified in refusing to answer the first and second of the above questions; the third, standing by itself, is unintelligible; the fourth and fifth present more difficulty, as they only refer to the article sold, not to the labels; but as there is no evidence of any other imitation but in the labels, they must be considered as tending to the same result, and as equally inadmissible.

The plaintiff had a right to the production of the books, but there is no evidence before me of a refusal to produce them. I am satisfied with the views of Justice BONNEY of the Supreme Court, on a similar motion in an action by the present plaintiff, on that point.

The motion for an attachment, therefore, must be refused, without costs.

TOWN *v.* THE SAFEGUARD INSURANCE COMPANY OF NEW YORK AND PENNSYLVANIA.

1. On proceedings supplementary to execution, neither a witness nor a person alleged to have property belonging to the judgment debtor, can be required to answer questions put with a view to eliciting evidence tending to show that transfers of property made by such debtor were made with intent to defraud creditors.
2. Property in the possession of a third person claiming title, no matter how fraudulent the transfer, the Judge cannot order to be delivered to the creditor.
3. The object of the examination is the discovery of property in the possession or control of the debtor.

(At Chambers, July 13th, 1860. ROBERTSON, J.)

THE facts are stated in the opinion.

ROBERTSON, J. Examinations or supplementary proceedings to a judgment can only be extended to the discovery of the property in the possession or control of the defendant, which he can deliver over; if in the possession of another claiming title, no matter how fraudulent the transfer, no order can be made to compel him to deliver the property, and, therefore, no questions can be put to the debtor or a witness to discover or prove the fraud. Such an examination is a fishing one and was not the object of these proceedings. The remedy of the creditor is by direct action against the fraudulent assignee, when the good faith of the assignment is in issue. The difficulty of ascertaining the disposition of property does not justify the assumption of this unlimited jurisdiction.

The witness in this case, as an officer of the Company, takes the place of a debtor in an ordinary case, and is not bound to go further in making disclosures than answering what has become of the property of the defendants, so as to see whether it can be delivered. The questions, therefore, to that extent, must be allowed. The questions not having been submitted to me, I cannot specify which come within the rule now laid down.

JOHN C. WHEELER v. MRS. HARTWELL.

In an action against a female, she cannot be arrested and held to bail, on the ground that she fraudulently contracted the debt on which the action is brought.

(At Chambers, September 15, 1860. Before BOSWORTH, Ch. J.)

THE plaintiff applied for an order in this action, to arrest and hold the defendant to bail, on the grounds, that she owed the plaintiff $75, for the board of herself and daughter, and fraudulently contracted such debt.

BOSWORTH, Ch. J., denied the application, holding that the provisions of the Code, that "no female shall be arrested in any action, except for a willful injury to person, character or property," (Code, § 179,) exempted the defendant from arrest in this action, although she may have fraudulently contracted the debt in question.

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